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IN THE

Supreme Court of the United States

October Term, 1958

No. 249

ALBERT E. PERRY,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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The Petitioner prays that a Writ of Certiorari issue to review the Judgment and Decision of the Supreme Court of North Carolina entered in the above entitled case on April 29, 1959.

Opinion Below

The Opinion of the Supreme Court of North Carolina is reported at 250 N. C. 119 and at 108 S. E. 2d 447, and the same is copied in the appendices to this Petition as Appendix B. The Judgment of the Supreme Court of North Carolina is a part of the Record before this Court and is copied in the appendices to this Petition, as Appendix A. The Judgment of the Superior Court of Stanly County, which was the trial court below, is found in the record which was before the Supreme Court of North Carolina, which record is copied in the appendices to this Petition, as Appendix C, and the Judgment of the Superior Court of Stanly County is found on page ..... hereof.

Jurisdiction

The Judgment and the Opinion of the Supreme Court of North Carolina, upon Petitioner's Appeal from the Superior Court of Stanly County, were entered on May 11, 1959 and on April 29, 1959, respectively. Petitioner specially and in due form contended before both state courts that the grand jury which indicted him was unlawfully and unconstitutionally constituted by virtue of alleged purposeful, racial discrimination in the composition of the said grand jury, in that, member of Petitioner's race, to wit, members of the Negro race, are purposefully and systematically excluded from grand juries and, in that, members of Petitioner's race were purposefully and systematically excluded from the grand jury which indicted Petitioner. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1257(3) and 2101(d), and under the Revised Rules of this Court, Rule 22(1). See *Eubanks* v. *State of Louisiana*, 356 U. S. 584, 78 S. Ct. 970, 2 L. ed. 2d 991; *Patton* v. *State of Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. ed. 76; *Smith* v. *State of Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. ed. 84; *Hill* v. *Texas*, 316 U. S. 400, 62 S. Ct. 1159, 86 L. ed. 1559.

Questions Presented

Prior to entering a plea to the bill of indictment against him upon the call of his case for trial before the Superior Court of Stanly County, Petitioner filed and presented a written motion to quash the bill of indictment against him by reason of racial discrimination in the constitution of the grand jury which indicted him and in the grand juries of Union County "for a long period of time." See Petitioner's motion as copied in Appendix C of this Petition. After the introduction of evidence upon this phase of this case, the

trial court overruled Petitioner's motion in a written Order in which he stated certain enumerated findings of fact (Appendix C of this Petition). Petitioner duly excepted to the overruling of his motion and to most of the findings of fact as formulated by the trial court (Appendix C of this Petition). Petitioner preserved, on appeal to the State Supreme Court, his contentions relative to the racial discrimination which he alleged had infected the grand jury which had indicted him. See Petitioner's Assignments of error 1 and 2 before the Supreme Court of North Carolina as the same appear in the Record before this Court. The Opinion of the Supreme Court of North Carolina, 250 N. C. 119, 108 S. E. 2d 447, reports the following:

> "At the 24 November Term 1958 of Stanly Superior Court, the defendant, again in apt time, before pleading to the bill of indictment, moved to quash the bill of indictment on the grounds that he did at his former trial at the October 1957 Mixed Term of Union County, as above stated . . .
>
> "Defendant assigns as errors Judge Olive's findings of fact Number 1, 3, 4, 5 and 6, for the reason that these findings of fact are contrary to the evidence offered by the defendant, and to all the competent evidence offered during the hearing of the motion to quash the bill of indictment . . ." (Appendix B, this Petition).

The Supreme Court of North Carolina, after a discussion of the evidence relating to Petitioner's contention of racial discrimination in the composition of Union County grand juries and after a discussion of legal principles which the Honorable State Supreme Court deemed applicable to the evidence upon the instant record, specifically ruled upon Petitioner's contentions in the following language:

> "Defendant's assignments of error to Judge Olive's failure to find that Negroes have been systematically

excluded from serving on grand juries of Union County for more than twenty years, and including the grand jury impanelled in 1957, and from the grand jury that indicted defendant, are overruled." 250 N. C. 119 and 108 S. E. 2d 447. (See also Appendix B, of this Petition.)

The Honorable State Supreme Court, in its Opinion, is aware of the fact that only one Negro has been known to have served on the Union County Grand Jury prior to Petitioner's indictment in October, 1957 (Appendix C, this Petition). But the Court has seized upon the evidence that one Negro, to wit, Lex Houston, has served upon a Union County Grand Jury since Petitioner's indictment in October, 1957, as evidence of the non-existence of racial discrimination in 1957 and prior thereto. In this vein the Opinion of the State Supreme Court reads as follows:

" . . . Judge Olive found in his findings of fact Number 3 that 'members of the colored race served on grand juries at various times before and subsequent to 1957.' The evidence plainly shows and he should have found, that two Negroes have served on Union County grand juries for at least eight years prior to November, 1958, to wit, Ike Montgomery in 1954, and Lex Houston in 1958. *We amend his finding of fact in that respect alone.* Before 1950 the evidence is not sufficiently clear to justify a finding of fact that Negroes have served upon the grand juries of Union County from 1936 to 1950. A study of the evidence plainly shows that this is not a case where Judge Olive's crucial findings of fact are so lacking in support in evidence that to give them effect would work that fundamental unfairness which is at war with due process or equal protection. Defendant's assignment of error to Judge Olive's findings of fact, as amended by us,

are overruled." (Emphasis added.) (Appendix B, of this Petition.)

Again, the finding of fact above referred to, as amended by the State Supreme Court, is utterly contrary to the evidence upon the instant Record and to the testimony of jury officials whose combined tenure of office extends to 1930. Particularly, the finding of fact, as amended by the State Supreme Court totally and arbitrarily ignores plenary evidence adduced by petitioner from the lips of jury and county officials that no Negroes served on Union County grand juries for at least the 20 year period prior to 1950 within memory of jury and county officials who had opportunity, occasion and cause to observe grand juries and whose recollection was refreshed by a complete grand jury list which covered the 23 year period of time after and including the year 1936. The Clerk of the Superior Court of Union County, who had been in that capacity for nine years at the time of his testimony and who had been County Tax Collector for 13 years prior thereto, testified as follows:

> "To the best of my knowledge Ike Montgomery was the first Negro to serve on the Grand Jury during the period of time covered here (1936-1958). I cannot recall any other person before 1958 who served on the Grand Jury. Prior to the time then that this bill of indictment was taken out, in October, 1957, Ike Montgomery was the only one who had served on the Grand Jury in Union County to my knowledge." (Parentheses added.) (See Appendix C, this Petition.)

The memory of the present County Tax Collector, as a County and jury official, went back for more than 28 years, that is until 1930. The Tax Collector testified that he had been in his present official position for eight years and

that prior to being Tax Collector he was Sheriff of Union County for sixteen years and a Deputy Sheriff for about four years preceding his tenure as Sheriff (Appendix C, this Petition). He testified that by virtue of his several official positions, he was "familiar with most of the people that lived in this County" (Appendix C, this Petition). Relative to his tenure as Sheriff, Deputy Sheriff and County Tax Collector, the present Tax Collector testified:

> "I haven't been to court since 1950. I didn't miss a court for the twenty years I was there. For the 20 years I was there drawn on the panel before and after then. (sic) For a one-week term you draw 48, for a two-weeks term you draw 48.
>
> "I cannot say that any Negroes were on the Grand Jury during my term. They were on the regular panel but the Grand Jury is selected out of the regular panel in the courtroom in the presence of the Court by a child out of a hat. The whole panel is in there. I think if a Negro had been chosen to serve on the Grand Jury I would have known it. I could not say for sure that any Negroes did not serve on the Grand Jury, but I do know that they have been on the regular juries and there could have been one on the Grand Jury, but I could not name one by name. I know Ike Montgomery. I am not sure which township he lives in but I think it is Vance. I have my scroll for the year 1954." (See Appendix C of this Petition.)

Moreover, petitioner's evidence indicated that the entire grand jury list for Union County, from and including the year 1936 and including the year 1958, which consisted of some 414 grand jurors, was introduced into evidence and the several jury and county officials (the incumbent Clerk of Union County Superior Court and former County Tax Collector, the incumbent Tax Collector and former County

Sheriff and Deputy Sheriff, the incumbent County Tax Accountant and an incumbent Sheriff-elect and Deputy Sheriff—whose combined tenure of offices extended from the date of petitioner's trial in November, 1958, to and including 1930, all years inclusive), testified in reference to the above mentioned list of grand jurors in respect to Negro names thereon (See Appendix C of this Petition). See also, the Record before this Court for the certified list of grand jurors of Union County for the years 1936 to 1958. The total import of all of the evidence was that only one Negro, one Ike Montgomery, had served upon a Union County grand jury during the period covered by Petitioner's inquiry and prior to his indictment in October, 1957. And it must be remembered that the County Accountant and County Tax Supervisor, testified as follows:

"I am the County Tax Accountant and County Tax Supervisor. I have been in that capacity since May 15, 1935. There has been no time that I have not been Accountant since 1935. . . . In my duties with the Commissioners I help prepare jury list. We prepare the jury list every two years in the County from the tax scrolls. That is done in my office, the office force, office girls. We prepare them for men, both Negro and white. Then for women, both white and Negro, we prepare that list from the town registration precincts books. We only get the names of the women from township registration books. After we prepare the list, we present it to the Board. We take the names of all of the taxpayers in the County and we have been doing that for about 10 years.

"When I first went there, we were selecting on a basis of whether or not they paid their prior years taxes. That was for a number of years. I don't know how many. Before that time, we used no other method of elimination except the prior taxes. . . . *We distin-*

guish the names from a white person who may have the same name by putting beside the name 'col' and we put 'col' on all of the names of colored taxpayers that we take from the book.

"*When the names are drawn from the jury box, we can always tell if it is colored by the 'col' beside the name. . . .*

" . . . In addition to tax list, we have a township precinct list. They are not kept according to race to my knowledge. They are right straight down the line. We could not determine a white person's name from a colored person's name. That notation according to the race is only made in the scrolls that are put in the jury box which came from the tax list. About 10% of the names that are placed in the jury box comes from the precinct list and that 10% is women. I have been Tax Accountant since 1935. I have a pretty good knowledge of the residents of Union County. . . .

" . . . *I have an opportunity to observe the Grand Jury because my office adjoins the courtroom there and occasionally I see them coming in and out.* That is about the extent of it. And from time to time they come in and inspect my office and to look at my books. To my own knowledge I have noticed Negroes on the Grand Juries. I believe it was either this past session or the session of 1957. One came in with the divided group. They don't come all 18. Some go to the jail and some to the courthouse. *Since I have been serving as County Official I can remember seeing only one Negro serving on the Grand Jury*" (Emphasis added) (Appendix C, this Petition).

Thus it is seen that the evidence adduced by petitioner from the lips of jury and county officials presented a complete mosaic of the racial constitution of Union County

grand juries from which members of petitioner's race were all but totally excluded over at least a 38 year period of time. In view of the evidence upon the instant Record, to say, as the Supreme Court of North Carolina has said, that "two Negroes have served on Union County grand juries for at least eight years prior to November, 1958, to wit, Ike Montgomery in 1954, and Lex Houston in 1958" (It should be remembered that Lex Houston's service in 1958 was after petitioner's indictment in October, 1957), and that "before 1950, the evidence is not sufficiently clear to justify a finding of fact that Negroes have served upon the grand juries of Union County from 1936 to 1950," appears to be sleight of hand for concluding *that only one Negro has served on a Union County grand jury for a 22-year period preceding* petitioner's indictment in 1957. Again, it would appear that the State Supreme Court has attempted to shield this *amended finding of fact* from further judicial scrutiny. The Opinion of the Court reads in part:

> "The findings of fact of Judge Olive are conclusive on appeal if supported by competent evidence 'in the absence of some pronounced ill consideration' of the evidence by Judge Olive (Citation of cases omitted) . . .
>
> " . . . Judge Olive's findings of fact are amply supported by competent legal evidence with this exception: Judge Olive found in his finding of fact Number 3 that 'members of the colored race served on the grand jury at various times before and subsequent to 1957.' The evidence plainly shows, and he should have found, that two Negroes have served on Union County grand juries for at least eight years prior to November, 1958, to wit, Ike Montgomery in 1954, and Lex Houston in 1958. We amend his findings of fact in that respect alone. Before 1950 the evidence is not sufficiently clear to justify a

finding of fact that Negroes have served upon the grand juries of Union County from 1936 to 1950. A study of the evidence plainly shows that this is not a case where Judge Olive's crucial findings of fact are so lacking in support in the evidence that to give them effect would work that fundamental unfairness which is at war with due process or equal protection" (See Appendix B, this Petition). See, also, *State v. Perry*, 230 N. C. 119, 108 S. E. 2d 447.

Again, since neither the trial court nor the State Supreme Court has noticed petitioner's plenary evidence and contentions that members of petitioner's race were totally absent from grand juries of Union County for the period of time between 1954 and 1936 and before, it is obvious that the finding of fact as formulated by the trial court and as amended by the State Supreme Court is not responsive to the issues raised and presents no judicial answer to petitioner's claim and evidence of racial discrimination in the grand jury system and practice in Union County. Compare *Carlson v. Curtiss*, 234 U. S. 103, 34 S. Ct. 717, 58 L. ed. 1237; *Merchants' National Bank v. Richmond*, 256 U. S. 635, 41 S. Ct. 619, 65 L. ed. 1135; *Brooklyn Saving Bank v. O'Neil*, 324 U. S. 697, 65 S. Ct. 895, 89 L. ed. 1296. Further, it is obvious that the Honorable State Supreme Court below has misinterpreted decisions of this Court to hold that petitioner was obligated to offer specific instances of racial discrimination against him in order to carry his burden of proof, in spite of the fact the evidence conclusively presented a long and unexplained absence of Negro grand jurors and an unexplained sparsity of Negro names upon the grand jury lists which could not have resulted from the operation of the law of chance. In this vein the Opinion of the State Supreme Court reads:

"Defendant has offered no evidence of any racial discrimination at any time against members of the

Negro race in the preparation of the jury list and the jury box in Union County; and in drawing jurors from the jury box for a term of court. Defendant has offered no evidence of any racial discrimination at any time against members of the Negro race in the drawing in open court by a child under ten years of age of the names of eighteen jurors to serve as a grand jury from the names of all persons returned as jurors at that term from a box or hat containing the names of all the jury panel, as is required by N. C. G. S., Section 9-24. . . .

"A Negro objecting to a grand or petit jury because of alleged discrimination against Negroes in the selection must affirmatively prove that qualified Negroes were intentionally excluded from the jury because of their race and color. *State* v. *Perry, supra; Miller* v. *State*, 237 N. C. 29, 74 S. E. 2d 513, certiorari denied 34 U. S. 930, 73 S. Ct. 792, 97 L. ed. 1360; *Fay* v. *People of New York*, 332 U. S. 261, 67 S. Ct. 1613, 91 L. ed. 2043; *Akins* v. *State of Texas, supra*. . . .

"*Eubanks* v. *State of Louisiana*, 356 U. S. 584, 78 S. Ct. 970, 2 L. ed. 991, is plainly distinguishable. The procedure in the State of Louisiana in selecting grand jurors is entirely different from the procedure in North Carolina. The facts of the two cases also differ" (Appendix B, this Petition). See also *State* v. *Perry*, 250 N. C. 119, 108 S. E. 2d 447.

Nevertheless, juries in Union County are selected from tax scrolls which constitute 90% of the jury box and from voting registration books which constitute the remaining 10% of the entire jury list. (See this testimony of the County Tax Accountant, Roy J. Moore, Appendix C, this Petition.) The parties stipulated that from 1954 to 1958 the percentage of the Negro Taxpayers to white taxpayers

was 12½% (Appendix C, this Petition). Mathematical computation, when applied to the evidence of the County Tax Collector, B. F. Nivens, indicates that the percentage of Negro taxpayers to white taxpayers averaged more than 16% for years between 1935 and 1953 inclusive (Appendix C, this Petition). By way of example, the ratio of Negro taxpayers to white taxpayers in 1933 was 13.2%; in 1942: 20.8%; in 1953: 16%. If it be generously allowed that no Negro names were ever placed in the jury box from the voting registration books and if it also be generously allowed that only 12.5% of the tax lists, which have been placed in the jury box over the years, were names of Negroes, it is seen that more than 11% of all names in the jury box were necessarily the names of Negro prospective jurors. When this indubitable conclusion is set against the fact that only one Negro grand juror was seated during the 22-year period prior to petitioner's indictment (approximately 0.25% of the total), and only two during the 23-year period prior to the year 1958 inclusive (approximately 0.48% of total number being Negro), it is obvious that the "law of chance and probability" received an assist in bringing about this incredible result. This incredible result is rendered all the more incredible by testimony of jury and county officials that Negro jurors are generally among the panel of 48 from which the grand jury of 18 are drawn "by lot." See testimony of Sheriff-elect Shelley Griffin, where he testified:

> "I have been Deputy Sheriff for eight years. When the court is in session, I take charge of the courtroom . . .
>
> "During my eight years of public service there, I have observed the trial panel and have observed Negroes serving on the trial juries. About every term of Court we have from one to two, maybe more. And

that has been true within the past eight years. I have just been elected Sheriff of the County . . ." (Appendix C, this Petition).

And the testimony of the Tax Collector and former Sheriff, B. F. Niven, who testified to the same effect relative to the presence of Negroes in the *jury panel* during his 20-year tenure in the County Sheriff office from 1930 to 1950.

Obviously the Negro names upon the tax lists and scrolls are either consistently and by design not reaching the jury box or they are purposefully and by design not being drawn out. Or, perhaps, they are consistently and by design not reaching the "jury hat" or they are purposefully and by design not being accepted for grand jury service. Whatever is the case, the disparity in the figures protracted over the time involved is sufficient to conclusively demonstrate racial discrimination in the composition of grand juries in Union County and in the grand jury which indicted petitioner. See: *Neal* v. *State of Delaware*, 103 U. S. 370, 13 Otto 370, 26 L. ed. 567; *Hill* v. *State of Texas*, 316 U. S. 400, 62 S. Ct. 1159, 86 L. ed. 1559; *Patton* v. *State of Mississippi*, 322 U. S. 463, 68 S. Ct. 184, 92 L. ed. 76; *Norris* v. *State of Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. ed. 1074; *Cassell* v. *State of Texas*, 325 U. S. 398, 65 S. Ct. 1276, 86 L. ed. 1692; *Pierre* v. *State of Louisiana*, 306 U. S. 354, 59 S. Ct. 536, 83 L. ed. 757; *Smith* v. *State of Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. ed. 84; *Brunson, et al.* v. *State of North Carolina*, 333 U. S. 851, 68 S. Ct. 634, 92 L. ed. 1133; *Eubanks* v. *State of Louisiana*, 356 U. S. 584, 78 S. Ct. 970, 2 L. ed. 2d 991. A casual reading of the Opinion of the North Carolina Supreme Court will not fail to reveal that the Court below has erroneously assumed that the doctrine of *Eubanks* v. *State of Louisiana*, *supra*, does not apply where selection of grand jurors is by lot rather than by

judicial discretion; even though the disparity between the number of Negroes presumably qualified for grand jury service and who actually serve defies reason or explanation and cannot be attributed to chance. In view of (a) the arbitrary failure of the Court below to notice petitioner's evidence and proof of long and continued racial discrimination in the composition of Union County grand juries, (b) the erroneous interpretation by the North Carolina Supreme Court of decisions of this Court, (c) the Record and evidence in this cause, and (d) the treatment by the Court below of the fact that a Negro grand juror served subsequent to petitioner's indictment as evidence and matter tending to negate petitioner's contention that his indictment was produced by a racially discriminatory jury system, the questions presented are as follows:

1. Did the Honorable Court below arbitrarily, erroneously and prejudicially fail to notice petitioner's evidence and proof of long and continued racial discrimination in the composition of Union County grand juries?

2. Did the Honorable Court below erroneously assume that under decisions of this Court, petitioner was obligated to adduce specific instances of racial discrimination in the composition of Union County grand juries and in assuming that the fact that only one Negro had served on a Union County grand jury in the 22 or 28 years next preceding petitioner's indictment, was inconsequential upon the petitioner's claim of racial discrimination in the composition of the grand jury which indicted him in 1957 and in the Unions County grand jury system?

3. Did the Honorable Court below erroneously assume that the fact that grand jurors in Union County are presumably selected by lot and chance, rather than

by judicial discretion or other subjective consideration, made inapplicable the holdings of this Court that racial discrimination in the composition of grand juries is proved by long, continued and unexplained absence of Negro grand jurors, when there are Negroes qualified for grand jury service and whose names are presumably in the jury box?

4. Did the Honorable Court below erroneously and prejudicially fail to quash the indictment against petitioner by reason of racial discrimination in the grand jury system which produced petitioner's indictment?

5. Did the Honorable Court below erroneously and prejudicially err in its treatment of the fact that a Negro grand juror was called and served immediately subsequent to petitioner's indictment in October, 1957, in so far as the Court below used this subsequent jury service in an attempt to prove the non-existence of racial discrimination in the grand jury system at the time of petitioner's indictment?

Statutes Involved

North Carolina General Statutes 9-24, 9-25 and 9-26, are involved in this action, and they or the pertinent portions thereof are copied in the appendices to this Petition as Appendix D. The 14th Amendment to the Constitution of the United States is also involved in this litigation.

Statement

This was a criminal action which was tried during the Criminal Term of the Superior Court of Stanly County before Honorable Hubert E. Olive and a jury. (State Record, p. 1). The indictment, alleging the crime of abor-

tion, under North Carolina General Statute 14-45, was returned by the Grand Jury of Union County during the October, 1957 Term (State Record, p. 2). The action was originally tried in the Superior Court of Union County during the October, 1957 Term (State Record, p. 4), and the judgment and the conviction of that court were reversed by the Judgment and Opinion of the Supreme Court of North Carolina during the Spring Term, 1958 (State Record, p. 3), because of error indicated in the Opinion of the Supreme Court of North Carolina. See *State v. Perry*, 248 N. C. 334, 103 S. E. 2d 404.

Upon the call of this case for hearing during the August, 1958, Term of Union County Superior Court, petitioner filed a written motion for removal of the cause to some other adjacent or other County for trial, and the motion was resisted by the written Answer of Honorable M. G. Boyette, Solicitor (State Record, pp. 4 to 9). In an order entered on the 27th day of August, 1958, in the Superior Court of Union County, by Honorable Hubert E. Olive, Judge Presiding, the instant cause was transferred to the Superior Court of Stanly County.

Upon the call of this cause for trial in the Superior Court of Stanly County, petitioner renewed a Motion to Quash and Dismiss the Bill of Indictment against him because of alleged racial discrimination in the Union County Grand Jury which indicted him, and because of an alleged racial, discriminatory grand jury system in Union County (State Record, pp. 11 to 17). After hearing the evidence adduced upon the hearing of the above mentioned Motion, the Court overruled petitioner's Motion to Quash and Dismiss the Bill of Indictment (State Record, p. 61), and subsequently entered a written order to that effect (State Record, pp. 17, 18, 61 and 62). To the overruling of his motion, peti-

tioner objected and excepted (State Record, pp. 19, 20, 21, 63, 64 and 65). Immediately thereafter, petitioner entered a plea of "NOT GUILTY," and the trial on the merits of the Indictment proceeded (State Record, pp. 21 and 65). From a verdict of "GUILTY, AS CHARGED" and an active prison sentence of "not less than 2 years nor more than 3 years," petitioner appealed to the Supreme Court of North Carolina (State Record, pp. 21, 23, 129 and 135). On the 27th day of April, 1959, the Supreme Court of North Carolina entered an Opinion in which it affirmed the Judgment of the Superior Court of Stanly County (See Appendices A and B, this Petition).

Upon his Motion to Quash and Dismiss the Bill of Indictment by reason of the racial discrimination in the composition of the Union County Grand Jury which indicted petitioner, petitioner offered a certified copy of the grand jury list of Union County from 1936 to 1958, both years included (State Record, pp. 54 and 136 to 147), and the testimony of witnesses to the effect that prior to the indictment of petitioner only the name of one Negro is upon the above-mentioned list (State Record, pp. 36, 55 and 56). Under the topic, "Questions Presented," petitioner has already alluded to most of the evidence which was adduced by him upon his motion to quash the bill of indictment by reason of racial exclusion of his race; to wit, the Negro race, from grand jury service in Union County.

In addition to the evidence mentioned and quoted under the topic, "Questions Presented," The United States Census Report for Union County was received into evidence and revealed a Negro adult population of slightly more than 20% of the total adult population for the census years of 1930, 1940 and 1950 (State Record, pp. 54 and 55). Again, the tax books for the years 1935 through 1953 were broken down by the County Tax Collector, revealing approximately

a ratio of 16 Negro taxpayers to every 84 white taxpayers (State Record, pp. 36 to 41). The Tax Collector testified that the ratio was the same in 1954 as it was in prior years and it was stipulated that the ratio was the same in 1954 through 1958, as it was in years prior to 1954 (State Record, pp. 56 and 57).

The petitioner also offered the testimony of the Clerk to the County Board of Commissioners, Roy J. Moore, who is also County Tax Accountant and who testified that, *except for statutory exemptions*, all male names on the tax list or tax scrolls are placed in the jury box; that the tax scrolls account for 90% of all names in the jury box; that the remaining 10% of names in the jury box are the names of women from the voting precinct book (State Record, pp. 44, 46, 48, 49 and 50). His testimony that, *except for statutory exemptions*, all male names are placed in the jury box, is corroborated by James R. Braswell, chairman of the County Board of Commissioners (State Record, pp. 51 and 52), and by his own affidavit and the affidavit of Chairman Braswell (State Record, pp. 48 and 52).

Petitioner's witnesses—all jury and county officials—concurred in the conclusion that Negroes appear regularly upon jury panels but that Ike Montgomery and Lex Houston are the only Negroes identified as having performed grand jury service during official memories of the witnesses, which period extends back to 1930. All agreed, however, that Negroes regularly appeared upon the several trial jury panels. The evidence was that Lex Houston served upon the grand jury in Union County in 1958; this is subsequent to petitioner's indictment in 1957. Finally, between 1936 and 1957, it appears that 396 grand jurors were called and seated in Union County. Of this number, only one, or 0.25% of the total, was a Negro.

Following the overruling of petitioner's Motion to Quash and Dismiss the Bill of Indictment, the charge against petitioner was tried, with petitioner testifying in his own behalf.

Reason for Granting the Writ

The decision of the court below should be reviewed by this Court because of numerous impelling reasons, all of which are obvious from a reading of the text of the Opinion of the State Supreme Court, and some of which are enumerated immediately below:

1. The Opinion of the Supreme Court of North Carolina has arbitrarily failed to notice petitioner's evidence of the absence of Negro grand jurors prior to 1950, although petitioner examined several County officials whose memories and tenure of office reached back much farther than 1950, to wit, to 1930, and whose memories were refreshed by use of a complete list of grand jurors which included the year 1936. The findings of the trial court had presumed to conclude that Negro grand jurors had served during this period, although such a finding was unalterably in conflict with the evidence (Appendix B, this Petition). However, the Opinion of the Supreme Court of North Carolina has amended this finding *by merely failing to find one way or the other for the period of time prior to 1950.* To permit the state courts to thus arbitrarily ignore petitioner's contentions in this manner is to deprive petitioner of the benefit of the federal right which he invokes. Compare *Carlson* v. *Curtiss*, 234 U. S. 103, 34 S. Ct. 717, 58 L. ed. 1237; *Merchants' National Bank* v. *Richmond*, 256 U. S. 635, 41 S. Ct. 619, 65 L. ed. 1135; *Brooklyn Saving Bank* v. *O'Neil*, 324 U. S. 697, 65 S. Ct. 895, 89 L. ed. 1296. Again, such a procedure is the granting of a hearing in form only, with the imposition of judgment without benefit of a real verdict.

Compare *Postal Telegraph Cable Company* v. *Newport*, 247 U. S. 464, 38 S. Ct. 566, 62 L. ed. 1215.

2. Any reading of the Opinion below will reveal that the Honorable Court below has construed the decisions of this Court to hold that, in spite of long and unexplained absences of Negro grand jurors in the subject county, the Negro defendant has the burden of offering specific instances of racial discrimination in order to make out a case of grand jury discrimination. This is obviously the imposition of an impossible burden upon a defendant who is more aware of results obtained than with the subtleties by which the unconstitutional deprivation is created. See *Eubanks* v. *State of Louisiana*, 356 U. S. 584, 78 S. Ct. 970, 2 L. ed. 991; *Patton* v. *State of Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. ed. 76; *Smith* v. *State of Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. ed. 84. If this innovation is allowed to burden the assertion of by a Negro defendant against an alleged discriminatory jury system, the constitutional protection will be reduced to naught.

3. It is clear from the reading of the Opinion below that the State Supreme Court has erroneously assumed that the doctrine of the *Eubanks* and *Patton* cases, whereby racial discrimination is proved by long, continued and unexplained absence of Negro grand jurors, does not apply where grand jurors are "selected by lot" rather than by judicial or subjective discretion. However, nothing in the decisions of this Court immuned discrimination practiced through the medium of lottery. Compare *Lane* v. *Wilson*, 307 U. S. 268, 59 S. Ct. 872, 83 L. ed. 1281. Moreover, to give countenance to the notion that the doctrine of the *Eubanks* and *Patton* cases is inapplicable to racial discrimination resulting from or practiced in a lottery, would be a surrender of substance to form and a tacit limitation of prior decisions of this Court.

4. The Honorable State Court has improperly weighed evidence of the subsequent service by a Negro grand juror as evidence negating the long and protracted and unexplained absence of Negroes from the Union County grand juries at the time of petitioner's indictment. This appears little more than an attempt to judicially extinguish petitioner's constitutional right to be indicted, if indicted, by a grand jury from which his race has not been purposefully excluded. Compare *Postal Telegraph-Cable Company* v. *City of Newport*, *supra*; *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 40 S. Ct. 419, 64 L. ed. 751. To give approval to this course of action would be a substantial diminution of the rights heretofore guaranteed by the 14th Amendment to the United States Constitution, and it would be a tacit limitation or a silent overruling of prior decisions of this Court.

5. The Honorable State Court has improperly failed to quash the indictment against petitioner in view of the plenary evidence of the exclusion of Negroes from the grand jury which indicted him and from the Union County grand juries.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HERMAN L. TAYLOR
SAMUEL S. MITCHELL
125 East Hargett Street
Raleigh, North Carolina
Counsel for Petitioner

APPENDIX A

Judgment

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1959

No. 433—Stanly County

STATE

—v.—

A. E. PERRY

This cause came on to be argued upon the transcript of the record from the Superior Court Stanly County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable R. Hunt Parker, Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendant and surety to the appeal bond, George H. Rushing, Sr., do pay the costs of the appeal in this Court incurred, to wit, the sum of Forty Seven and 30 100 dollars ($47.30), and execution issue therefor.

A TRUE COPY

ADRIAN J. NEWTON
Clerk of the Supreme Court.

By SARAH G. BARBEE
Sarah G. Barbee
Deputy Clerk

APPENDIX B

Opinion

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1959

No. 433—Stanly

STATE

—v.—

A. E. PERRY

Appeal by defendant from Olive, J., November Criminal Term 1958 of Stanly.

Criminal prosecution on a bill of indictment charging the defendant A. E. Perry on 4 October 1957 with using drugs and instruments with intent thereby to procure the miscarriage of Lillie Mae Rape, a pregnant woman,—a violation of N. C. G. S. 14-45.

Prior to pleading to the bill of indictment, the defendant moved to quash it for reasons which will be set forth in the opinion. The trial court denied the motion to quash. Whereupon, the defendant pleaded Not Guilty. The jury returned a verdict of Guilty as charged.

From a judgment of imprisonment the defendant appeals.

MALCOLM B. SEAWELL, *Attorney General*, T. W. BRUTON, *Assistant Attorney General*, and RALPH MOODY, *Assistant Attorney General, for the State.*

TAYLOR & MITCHELL, *for Defendant, Appellant.*

Parker, J. This action was here on a former appeal by the defendant: S. v. Perry, 248 N. C. 334, 103 S. E. 2d 404.

An examination of the case on the former appeal and of the instant case shows that the bill of indictment in this case is the same bill of indictment that was before this Court on the former appeal of this case.

This appears from our decision of the former appeal: The defendant is a negro doctor. Lillie Mae Rape is a white woman. The bill of indictment, which charges that the offense was committed in Union County on 4 October 1957, was found on 28 October 1957 by the grand jury of Union County at the October 1957, Mixed Term Union County Superior Court, which convened on the day the indictment was found. The defendant on 28 October 1957, in apt time, before pleading to the bill of indictment (S. v. Linney, 212 N. C. 739, 194 S. E. 470; S. v. Speller, 229 N. C. 67, 47 S. E. 2d 537), filed a written motion to quash the bill of indictment, for the reason that negroes because of their race have been systematically excluded from serving upon grand juries of Union County for a long period of time, and that negroes because of their race were excluded from serving upon the grand jury of Union County at the term of court when the bill of indictment was found, and that such systematic exclusion of members of the defendant's race from the grand juries of Union County is a violation of his rights guaranteed to him by the due process and equal protection clauses of the Federal Constitution, and by Art. I, Sec. 17, of the State Constitution. On the day the bill of indictment was found, the trial court ordered a special venire of 50 persons from Anson County to appear in court on 30 October 1957, from which a trial jury was to be selected in the case. On 30 October 1957, the State announced it was ready to proceed with the trial. Whereupon, counsel for the defendant requested that they be given time and opportunity to inquire into the alleged systematic exclusion of negroes from grand jury service in Union County, and in support of their request and motion

to quash the bill of indictment filed an affidavit by one of defendant's counsel. The material parts of said affidavit are summarized in our opinion on the former appeal, and need not be repeated here. The trial court then found as a fact that the defendant had offered no evidence on his motion to quash the bill of indictment, except this affidavit, and denied the motion. To such denial the defendant excepted. The defendant then pleaded Not Guilty. He was convicted by the jury, and sentenced to a term of imprisonment by the court. From such sentence he appealed to the Supreme Court.

The Court on the former appeal reversed the verdict and judgment of imprisonment, and closed its opinion with this language:

"Whether a defendant has been given by the court a reasonable time and opportunity to investigate and produce evidence, if he can, of racial discrimination in the drawing and selection of a grand jury panel must be determined from the facts in each particular case. After a careful examination of all the facts in the instant case, it is our opinion that the trial court denied the defendant a reasonable opportunity and time to investigate and produce evidence, if such exists, in respect to the allegations of racial discrimination as to the grand jury set forth in the motion to quash and in the supporting affidavit of Samuel S. Mitchell. Whether the defendant can establish the alleged racial discrimination or not, due process of law demands that he have his day in court on this matter, and such day he does not have, unless he has a reasonable opportunity and time to investigate and produce his evidence, if he has any.

"The judgment and verdict below are reversed, and the case is remanded for further proceedings. In the Superior Court the defendant will have the opportunity to present the evidence, if any, that he may have as to the alleged

racial discrimination in the grand jury panel. If the trial court at such hearing then finds there was no racial discrimination, the trial will proceed on the present indictment. If the trial judge then finds there was racial discrimination in the grand jury panel, and quashes the indictment, the defendant is not to be discharged. He will be held until an indictment against him can be found by an unexceptionable grand jury. S. v. Speller, 229 N. C. 67, 47 S. E. 2d 537."

Our opinion on the former appeal was filed 7 May 1958. At the 25 August Term 1958 of the Superior Court of Union County, the defendant, pursuant to N. C. G. S. 1-84, made a motion for removal of his case for trial to some adjacent county, and supported the motion by an affidavit suggesting that there are probable grounds to believe that a fair and impartial trial of the case cannot be had in Union County. Judge Olive presiding granted the motion, and entered an order decreeing that the case be removed to the Superior Court of Stanly County for trial at the 24 November 1958 Term, or at a later term.

At the 24 November Term 1958 of Stanly Superior Court, the defendant, again in apt time, before pleading to the bill of indictment, moved to quash the bill of indictment on the identical grounds that he did at his former trial at the October 1957, Mixed Term of Union County, as above stated. In his motion to quash the defendant requested that the trial court issue subpoenas and subpoenas *duces tecum* requiring the presence in court of the Clerk of the Superior Court of Union County, the County Commissioners of Union County, the Sheriff of Union County, the Tax Collector of Union County, and the County Accountant of Union County as witnesses to be examined by him in respect to his contention that members of the negro race were purposely excluded by reason of their race from the grand jury of Union County which indicted him, and that such officials bring with them "certain records, documents

and papers pertaining to Union County Grand Jury Compositions since 1936 through the present year."

When the motion to quash the bill of indictment came on to be heard, the defendant placed on the stand and examined J. Hampton Price, Clerk of the Superior Court of Union County; B. F. Niven, the Tax Collector of Union County; Roy J. Moore, Tax Accountant and Tax Supervisor of Union County, and also Clerk to the Board of County Commissioners of Union County; James R. Braswell, Chairman of the Board of County Commissioners of Union County; and Shelly Griffin, a Deputy Sheriff of Union County for eight years, and in charge of the courtroom when court is in session. Ben Wolfe, Sheriff of Union County, did not appear, but sent a statement by a reputable physician to the effect that he is receiving treatment for severe high blood pressure, has frequent blackout attacks, and has been advised by his physician not to appear in court for any reason because of his health. The Record shows that these witnesses brought with them many and voluminous records, documents and papers pertaining to the composition of Union County Grand Juries for many years and up to the time of the hearing of defendant's motion to quash the bill of indictment. Defendant offered no other witnesses than those named above.

Judge Olive having heard all the evidence and arguments of counsel made the following finding of facts:

"1. That the said Grand Jury at the October 1957 Term of Union County Superior Court was regularly drawn and constituted as provided by the North Carolina Statute and there was no systematic, purposeful, intentional or arbitrary exclusion of any qualified person from said jury by reason of race, or otherwise.

"2. That adult negroes constitute approximately 12% of the total adult population of Union County, North Carolina.

"3. That, although there was no member of the colored race on the Grand Jury of Union County in 1957 (the Grand Jury of said County was chosen for a period of one year as provided by law), members of the colored race served on the Grand Jury at various times before and subsequent to 1957; and members of the colored race have served on the trial panel of said court regularly before, including and subsequent to 1957.

"4. That no evidence was offered by movant that any qualified person to serve as a juror was wrongfully excluded from serving on the Grand and Petit juries of Union County at any time.

"5. That the Bill of Indictment in this case was regularly and legally found and returned by a duly and legally constituted Grand Jury of Union County, North Carolina, at the October 1957 Term of Superior Court of said County.

"6. That none of the movant's constitutional rights were violated or abridged in the selection of the Grand Jury which found and returned the Bill of Indictment in this case."

Whereupon Judge Olive denied the motion to quash the bill of indictment.

Defendant assigns as errors Judge Olive's findings of fact Numbers 1, 3, 4, 5 and 6, for the reason that these findings of fact are contrary to the evidence offered by the defendant, and to all the competent evidence offered during the hearing of the motion to quash the bill of indictment. Defendant neither excepts to, nor assigns as error, the finding of fact Number 2 "that adult negroes constitute approximately 12½% of the total adult population of Union County, North Carolina."

The findings of fact of Judge Olive are conclusive on appeal, if supported by competent evidence, "in the absence of some pronounced ill consideration" of the evidence

by Judge Olive, S. v. Koritz, 227 N. C. 552, 43 S. E. 2d 77, cert. denied, 332 U. S. 768, 92 L. Ed. 354; S. v. Speller, 231 N. C. 549, 57 S. E. 2d 759, cert. denied, 340 U. S. 835, 95 L. Ed. 613; S. v. Kirksey, 227 N. C. 445, 42 S. E. 2d 613; S. v. Bell, 212 N. C. 20, 192 S. E. 852; S. v. Walls, 211 N. C. 487, 191 S. E. 232; S. v. Cooper, 205 N. C. 657, 172 S. E. 199; Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1692; Thomas v. Texas, 212 U. S. 278, 53 L. Ed. 512.

Prior to 1947, it was provided by N. C. G. S. 9-1 that the tax returns of the preceding year for the county should constitute the source from which the jury list should be drawn, and this was then the only prescribed source, and from this source shall be selected for the jury list the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. To meet the constitutional change of the previous year election, N. C. Const., Art. I, Sec. 13, making women eligible to serve on juries, N. C. G. S. 9-1 was amended in 1947, 1947 Session Laws, Ch. 1007, enlarging the source to include not only the tax returns of the preceding year but also "a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age," to be prepared in each county by the Clerk of the Board of Commissioners. The 1947 amendment struck out the provision as to the payment of taxes for the preceding year, and further provided that names for the jury list shall be secured from such sources of information as are deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. Excluded from the list are persons who have been convicted of crime involving moral turpitude, or are *non compos mentis*.

N. C. G. S. 9-2 provides that the jury list shall be copied on small strolls of paper of equal size and put into the

jury box. N. C. G. S. 9-3 provides that at least twenty days before a term of the Superior Court, the Board of County Commissioners shall cause to be drawn from the jury box by a child not more than ten years of age the required number of scrolls, and the persons who are inscribed on such scrolls shall serve as jurors at the term of the Superior Court next ensuing such drawing.

N. C. G. S. 9-24 provides that a Judge of the Superior Court presiding over a term of court at which a grand jury is to be selected "shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court." N. C. G. S. 9-25, Grand Juries in Certain Counties, provides as to Union County as follows: "A grand jury for Union County shall be selected at each February Term of the Superior Court in the usual manner by the presiding judge, which said grand jury shall serve for a period of one year from the time of their selection."

The grand jury which indicted the defendant at the October 1957, Mixed Term of the Union County Superior Court, was selected, sworn and impaneled at the February Term 1957 of Union County Superior Court, pursuant to N. C. G. S. 9-25, which appears in the Record of this case on the former appeal.

J. Hampton Price, Clerk of the Superior Court of Union County for 9 years, and prior to that County Tax Collector of Union County for about 13 years, testified in substance as follows: I have the jury book with me covering the period from 1945 up to the present. I think the Minutes of the Court took care of the jury up until that time. I have the Minutes Docket Book of the Court back to 1936. I am familiar with most of the names on the jury list since I have been Clerk. Ike Montgomery, a negro, was on the

grand jury in 1954. Lex Houston, a negro, is on the grand jury in 1958. There were other negroes in the panels, but when you are drawing them by lot it is not always possible to get a negro on the grand jury, due to the small ratio between negroes and whites in Union County. From 1950 to 1958, both inclusive, no negroes served on the grand juries of Union County, except Ike Montgomery and Lex Houston. In 1942 there is the name of Curtis Smith, and I think we have a Curtis Smith, white, and a Curtis Smith, negro. In 1945 there is one W. I. Helms, and I don't know if he is a negro or white. In 1948 there is a Hoyle Helms, and I don't know if he is a negro or white. In 1939 there is a Curtis Helms, and I don't know if he is a negro or white.

B. F. Niven, County Tax Collector of Union County for 8 years, and prior to that Deputy Sheriff of the county for 4 years, and Sheriff of the county for 16 years, testified in substance as follows: He has with him his records and ledgers for about 21 or 22 years. From his records he testified as to the numbers of whites and the numbers of negroes in the 9 townships of Union County for a number of different years. He didn't miss a court during the 20 years he was Deputy Sheriff and Sheriff. He did not attend court after he was Sheriff. He testified as follows: "I cannot say that any negroes were on the Grand Jury during my term. They were on the regular panel but the Grand Jury is selected out of the regular panel in the court-room in the presence of the Court by a child out of a hat. The whole panel is in there. I think if a negro had been chosen to serve on the Grand Jury I would have known it. I could not say for sure that any negroes did not serve on the Grand Jury, but I do know that they have been on the regular juries and there could have been one on the Grand Jury, but I could not name one by name. I know Ike Montgomery. I am not sure which township he lives in but I think it is Vance. I have my scroll for the year 1954."

Roy J. Moore, Tax Accountant and Tax Supervisor of Union County since 15 May 1935, testified in substance: He is Clerk to the Board of County Commissioners of Union County. He helps prepare the jury list. The jury list is prepared every two years from the tax scroll for men, both negroes and whites. He gets the names of women, both negroes and whites, from the precinct lists. About 10% of the names placed in the jury box are women. When the jury list is prepared, it is presented to the Board of County Commissioners. The names so presented are cut from this list, and put in the jury box. From the jury list presented to the Board of County Commissioners is excluded those people exempt from jury service by N. C. G. S. 9-19, to wit, all practicing physicians, regular ministers of the gospel, practicing attorneys at law, etc. No negroes have been excluded from grand juries because of race to his knowledge.

An affidavit of Roy J. Moore in the Record shows that 48 persons were drawn from the jury box for service as jurors at the February Term 1957 of the Union County Superior Court, and that of this number one person at least was a negro.

James R. Braswell, Chairman of the Board of County Commissioners of Union County for the past four years testified in substance: The jury list has been prepared and put in the jury box twice since he was chairman—in 1955 and 1957. The jury list is made up from the tax records and precinct scrolls. He has been present each time the jury was drawn from the jury box during his term of office. At no time during his chairmanship of the Board has there been any discrimination.

This appears from an affidavit of James R. Braswell in the Record: "Affiant further says that in selecting the names of male persons for jury service, in the manner above stated, no consideration or regard is given to race, creed or color; that all names of women are selected from the

precinct registration books for jury service without regard to race, creed, color or party affiliation; that the names of the white race and the negro race selected from the tax returns are therefore in direct proportion to the names of persons of the white race and the negro race appearing on the tax returns and the precinct registration books."

Deputy Sheriff Shelly Griffin, Deputy Sheriff for 8 years, a Policeman for 6 years, and just elected Sheriff of Union County, testified, in part, on direct examination by defendant's counsel: "I have been Deputy Sheriff for eight years. When court is in session, I take charge of the courtroom. The Sheriff is there most of the time and I am there most of the time also. During the period, I knew personally that Lex Houston served on the Grand Jury and I believe that he served this year. He is serving now. He began to serve in February, 1958. I cannot remember any others who served; there may have been one more, but I can't remember." On cross-examination by the State he testified: "During my eight years of public service there, I have observed the trial panel and have observed negroes serving on the trial juries. About every term of Court we have, from one to two, maybe more. And that has been true within the past eight years. I have just been elected Sheriff of the County." On redirect examination by defendant's counsel he testified: "During my eight years I have observed negroes on the jury panel, one or two on practically every jury panel. Prior to that time, I was a City Police Officer and I did not get too much chance to go into the courtroom. But during those eight years, I can only remember seeing two negroes on the Grand Jury."

Defendant introduced in evidence the grand jury lists of Union County Superior Court for the years 1936 through 1958.

Defendant has offered no evidence that any qualified negro, man or woman, has had his or her name excluded at

any time from the jury list or the jury box of Union County, or has been excluded at any time from serving on grand and petit juries in Union County Superior Court, by reason of race.

Defendant has offered no evidence of any racial discrimination at any time against members of the negro race in the preparation of the jury list and the jury box in Union County, and in drawing jurors from the jury box for a term of court. Defendant has offered no evidence of any racial discrimination at any time against members of the negro race in the drawing in open court by a child under ten years of age of the names of eighteen jurors to serve as a grand jury from the names of all persons returned as jurors at that term from a box or hat containing the names of all the jury panel, as is required by N. C. G. S. 9-24.

According to Judge Olive's finding of fact Number 2, to which defendant has not excepted, adult negroes constitute about 12½% of the adult population of Union County. The defendant's evidence clearly shows that for at least eight years prior to November 1958 one or two negroes have served on practically every jury panel at terms of Union County Superior Court, and from these panels during that time the grand juries of Union County Superior Court have been selected. The evidence is undisputed that the names of jurors drawn from the jury box to serve as jurors at the February Term 1957 Union County Superior Court contained at least the name of one negro, and that from this list of jurors the grand jury was drawn that found the bill of indictment in this case. Defendant's evidence also plainly shows that for at least eight years prior to November 1958, only two negroes, to wit, Ike Montgomery in 1954, and Lex Houston in 1958, have served upon the grand juries of Union County Superior Court. Considering all of the evidence, the facts that for at least eight years prior to November 1958 only two negroes were drawn from a box

or hat in open court by a child under ten years of age, as grand jurors from a list of jurors, practically all of which contained the names of one or two negroes, and that the grand jury finding the bill of indictment in this case was drawn from a jury panel containing at least one negro, do not show, in our opinion, that negroes because of their race have been systematically excluded from serving upon grand juries of Union County for at least eight years prior to November 1958, and in particular fails to show that negroes because of their race were wrongfully excluded from serving on the grand jury that found the bill of indictment against defendant in this case.

This Court said in State v. Walls, *supra*: "The child draws from the jury box the names of all sorts and conditions of men, white and negro persons, Jew and Gentile, who are qualified to serve under the law. A more perfect system could hardly be devised to insure impartiality."

Judge Olive's findings of fact are amply supported by competent legal evidence, with this exception: Judge Olive found in his findings of fact Number 3 that "members of the colored race served on the grand jury at various times before and subsequent to 1957." The evidence plainly shows, and he should have found, that two negroes have served on Union County grand juries for at least eight years prior to November 1958, to wit, Ike Montgomery in 1954, and Lex Houston in 1958. We amend his findings of fact in that respect alone. Before 1950 the evidence is not sufficiently clear to justify a finding of fact that negroes have served upon the grand juries of Union County from 1936 to 1950. A study of the evidence plainly shows that this is not a case where Judge Olive's crucial findings of fact are so lacking in support in the evidence that to give them effect would work that fundamental unfairness which is at war with due process or equal protection. Defendant's

assignments of error to Judge Olive's findings of fact, as amended by us, are overruled.

Defendant's assignments of error to Judge Olive's failure to find that negroes have been systematically excluded from serving on grand juries of Union County for more than twenty years, and including the grand jury impaneled in 1957, and from the grand jury that indicted defendant, are overruled.

Defendant assigns as error the denial of his motion to quash the bill of indictment.

A negro objecting to a grand or petit jury because of alleged discrimination against negroes in its selection must affirmatively prove that qualified negroes were intentionally excluded from the jury because of their race or color. S. v. Perry, *supra*; Miller v. State, 237 N. C. 29, 74 S. E. 2d 513, cert. denied, 345 U. S. 930, 97 L. Ed. 1360; Fay v. New York, 332 U. S. 261, 91 L. Ed. 2043; Akins v. Texas, *supra*.

This Court speaking by Ervin, J., said in Miller v. State, *supra*: "The Fourteenth Amendment to the Constitution of the United States does not confer upon a negro citizen charged with crime in a state court the right to demand that the grand or petit jury, which considers his case, shall be composed, either in whole or in part, of citizens of his own race. All he can demand is that he be indicted or tried by a jury from which negroes have not been intentionally excluded because of their race or color. In consequence, there is no constitutional warrant for the proposition that a jury which indicts or tries a negro must be composed of persons of each race in proportion to their respective numbers as citizens of the political unit from which the jury is summoned. Citing numerous cases from the U. S. Supreme Court and from our Court."

Eubanks v. Louisiana, 356 U. S. 584, 2 L. Ed. 2d 991, is plainly distinguishable. The procedure in the State of Louisiana in selecting grand jurors is entirely different

from the procedure in North Carolina. The facts of the two cases also differ.

The Supreme Court of the United States has held consistently for 80 years that the indictment of a negro defendant by a grand jury in a state court from which members of his race have been systematically excluded solely because of their race is a denial of his right to the equal protection of the laws required by the Fourteenth Amendment to the United States Constitution. S. v. Perry, *supra*; Miller v. State, *supra*; Eubanks v. Louisiana, *supra*. A like conclusion is reached in North Carolina by virtue of our decision on "the law of the land" clause embodied in the Declaration of Rights, Art. I, Sec. 17, of the North Carolina Constitution, and we have consistently so held since 1902. S. v. Peoples, 131 N. C. 784, 42 S. E. 814; S. v. Speller, 229 N. C. 67, 47 S. E. 2d 537; Miller v. State, *supra*; S. v. Perry, *supra*. However, the evidence in this case and Judge Olive's findings of fact do not show a systematic exclusion of members of the defendant's race, solely because of their race, from the grand jury which found the bill of indictment against him, and from grand juries of Union County for at least seven years before that time.

Judge Olive designates all of his findings as findings of fact. They are both findings of fact and conclusions of law. His findings of fact, as amended by us, amply support his conclusions of law and his order. Judge Olive properly denied defendant's motion to quash the bill of indictment, and his assignment of error thereto is overruled.

Defendant's assignment of error for the failure of the court to strike out an affidavit of James R. Braswell, Chairman of the Board of County Commissioners, offered in evidence by the State is overruled. The learned trial judge was well able to weigh the evidence, and to disregard incompetent evidence, if any, in the affidavit. There is nothing in Judge Olive's findings of fact to show, that if the

affidavit contained incompetent evidence, which we do not admit, it influenced in any way his findings of fact, his conclusions of law, and his order refusing the motion to quash the bill of indictment. Bizzell v. Bizzell, 247 N. C. 590, 101 S. E. 2d 668; Insurance Co. v. Shaffer, 250 N. C. ——, —— S. E. 2d ——.

Defendant has in his brief his exceptions to the failure of the trial court to sustain his motions for judgment of nonsuit. He makes no argument in his brief in respect thereto. He closes his brief by stating that if his assignment of error to the refusal of the court to quash the bill of indictment is overruled, that he should be awarded a new trial. There was sufficient evidence offered by the State to carry the case to the jury. The trial court correctly overruled defendant's motions for judgment of nonsuit.

Defendant's only other assignments of error, brought forward and discussed in his brief, relate to a hypothetical question asked Dr. J. G. Faulk. Dr. Faulk is a physician and surgeon. Defendant admitted he is a medical expert specializing in surgery. In October 1957 Dr. Faulk was chief of surgery in Union Memorial Hospital. On 12 October 1957 he saw Lillie Mae Rape in the hospital. He took her to an examination room, and did a pelvic examination. The hypothetical question contained a full and fair recital of all relevant and material facts already in evidence, and it was sufficiently explicit for the witness to give an intelligent and safe opinion. It was properly framed so as to inquire of Dr. Faulk, if he had a professional opinion, whether Lillie Mae Rape had had a miscarriage, and if so, what was the cause of it. Dr. Faulk drew no inference from the testimony. He merely expressed his professional opinion upon an assumed state of facts supported by evidence previously offered. Dr. Faulk's answers to the hypothetical question related to matters requiring expert knowledge in the medical field about which a person of ordinary experience would

not be capable of forming a satisfactory conclusion unaided by expert testimony from one learned in the medical profession. All defendant's assignments of error relating to the hypothetical question and the answers thereto are overruled. S. v. Knight, 247 N. C. 754, 102 S. E. 2d 259; S. v. Mays, 225 N. C. 486, 35 S. E. 2d 494; S. v. Dilliard, 223 N. C. 446, 27 S. E. 2d 85; S. v. Smoak, 213 N. C. 79, 195 S. E. 72.

Defendant's other assignments of error set forth in the Record are not brought forward and mentioned in his brief. In respect to them no reason or argument is stated, and no authority is cited in defendant's brief. They are, under our Rules and decisions, deemed to have been abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C. 544, 562; Ibid. in G. S., Vol. 4A 157, 185; S. v. Bittings, 206 N. C. 798, 175 S. E. 299; S. v. Gordon, 241 N. C. 356, 85 S. E. 2d 322; S. v. Atkins, 242 N. C. 294, 87 S. E. 2d 507; S. v. Thomas, 244 N. C. 212, 93 S. E. 2d 63; S. v. Adams, 245 N. C. 344, 95 S. E. 2d 902; S. v. Smith, 249 N. C. 653, 107 S. E. 2d 311. See Pruitt v. Wood, 199 N. C. 788, 156 S. E. 126.

In the trial belo we find

No Error.

APPENDIX C

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1959

No. 433—TWENTIETH DISTRICT

From Stanly

STATE

v.

A. E. PERRY

Before OLIVE, J., November 1958 Criminal Term, Stanly Superior Court. DEFENDANT Appealed.

MINUTE DOCKET 26, Page 404.

Organization of Court

Be it remembered that a Superior Court is begun for the County of Stanly at the Courthouse in Albemarle, North Carolina, on the 24th day of November, 1958, for the trial of Criminal cases only. The Honorable Hubert E. Olive, Judge Presiding, and the Honorable M. G. Boyette, Solicitor, prosecuting for and on behalf of the State.

Robert M. Furr, Sheriff of said County, makes return that in obedience to the writ of venire facias, heretofore to him directed, he has summoned the following good and lawful men to serve as jurors for the term:

E. Vonderyl Hall, E. M. Wagoner, David A. Morgan, Robert C. Hill, Connis Sylvester Huneycutt, Giles Farrest,

W. D. Isenhour, C. H. Beachum, Shepard S. Huneycutt, Geander D. Crisco, Clarence Hinson, Quince A. Efird, Herbert D. Peterson, Bain O. Talbert, Giff Carpenter, Bernon Hill, Roy J. Brown, W. V. Hudson, Jessie G. Morton, Robert D. Huneycutt, John Hugh Burleson, Walter Crayton, John Calvin Hahn, J. Frank Herrin, John Ray Parker, Jasper Hudson, Leroy Edwards, Marvin D. Furr, Clyde F. Hatley and J. V. Dry.

The following men are serving as Grand Jurors for the Term:

W. Horace Bowers, Theodore Roosevelt Smith, Grady Moore, Luther E. Almond, Cleary M. Haithcock, James Lowder Howell, Robert Waddell Lanier, Union Reeves Russell, Jim R. Kennedy, Noah M. Mauldin, Clifford L. Howard, and George E. McIntyre, Jr.

Bill of Indictment

SUPERIOR COURT

October Term A.D. 1957

State of North Carolina
Union County

The Jurors for the State upon their oath present, That A. E. Perry, late of the County of Union, on the 4th day of October, in the year of our Lord one thousand nine hundred and fifty-seven, with force and arms, at and in the County aforesaid, unlawfully, willfully and feloniously did administer to Lillie Mae Rape, a pregnant woman, and prescribe for said pregnant woman and advise and procure said Lillie Mae Rape to take medicine, drugs and other substances and used and employed other instruments and

means with intent thereby to procure the miscarriage of said Lillie Mae Rape, against the form of the statute in such case made and provided and against the peace and dignity of the State.

/s/ Boyette, Solicitor.

No. 708

State v. A. E. Perry

Indictment—Various Cases

....., Pros.

Witnesses:

Lillie Mae Rape	X
Mrs. Mary McCorkle	X
Dr. J. G. Faulk	X
Dr. K. E. Neese	X
Dr. F. B. Lee	X
Dr. Wm. H. Phifer	X
Dr. E. F. Hamer	X
A. A. Mauney	X
T. O. Broome	X
J. Emmett Griffin	X

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found A True Bill.

/s/ Smith Medlin
Foreman Grand Jury.

Judgment

SUPREME COURT OF NORTH CAROLINA

UNION COUNTY

NO. 435—SPRING TERM, 1958

STATE

VS.

A. E. PERRY

This cause came on to be argued upon the transcript of the record from the Superior Court Union County: Upon consideration whereof, this Court is of opinion that there is ..... error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable R. Hunt Parker, Justice, be certified to the said Superior Court, to the intent that the JUDGMENT IS REVERSED. And it is considered and adjudged further, that the County do pay the costs of the appeal in this Court incurred, to wit, the sum of One Hundred twenty-four and 50/100 dollars ($124.50) and execution issue therefor.

ADRIAN J. NEWTON
Clerk of the Supreme Court

(SEAL OF COURT
appears here)

/s/ MARY B. WILLIAMS,
Deputy Clerk.

A TRUE COPY

Motion for Removal of Cause

IN THE

SUPERIOR COURT

NORTH CAROLINA
UNION COUNTY.

STATE OF NORTH CAROLINA

vs.

A. E. PERRY, Defendant

Now comes Albert E. Perry, who is a Negro, defendant in the above entitled cause, through his counsel, the undersigned, and shows unto the Court the following:

1. That on the 28th of October, 1957, he was indicted by a Grand Jury in and for Union County upon a charge of violation of General Statutes 14-45, to wit, for the crime of "using drugs or instruments to produce miscarriage or injure a pregnant woman," one Lillie Mae Rape, a young white woman of this County.

2. That, pursuant to said indictment, he was tried upon the same in the Superior Court of Union County at the October 1957 Term of Court by a jury selected from the body of Anson County, which jury was so selected pursuant to the order of the trial Judge.

3. That the trial of defendant, as mentioned above, resulted in a conviction of defendant which he appealed to the Supreme Court of North Carolina; that pursuant to the judgment of the Supreme Court of North Carolina,

which reversed defendant's conviction, the cause against defendant has been scheduled for a new trial.

4. That he, this defendant, avers unto the Court that there are probable grounds to believe that a fair and impartial trial cannot be obtained and had by him in Union County upon such bill of indictment and upon the charge contained therein, for the reasons set forth in the affidavit made by him and attached hereto, and he requests the Court that said affidavit be taken as a part hereof as if the same were fully set forth herein.

5. That he, this defendant, avers unto this Court that, because of the circumstances set out in his supporting affidavits and which have been made part of this Motion, a trial of the cause against him in Union County would be and would result in a denial of his constitutional rights to a fair trial, such as are guaranteed to movant by Article I, Section 17 of the Constitution of the State of North Carolina and by the Due Process and Equal Protection Clauses of the Federal Constitution.

Wherefore, defendant moves the Court that an order be entered removing this cause from the Superior Court of Union County to the Superior Court of Mecklenburg County or some other adjacent or other County for trial, as may meet the ends of justice in said cause.

This 25th day of August, 1958.

TAYLOR AND MITCHELL
125 East Hargett Street
Raleigh, North Carolina,
of Counsel for Defendant.

Affidavit in Support of Motion for Removal of Cause

IN THE

SUPERIOR COURT

NORTH CAROLINA
UNION COUNTY.

STATE OF NORTH CAROLINA

vs.

A. E. PERRY, Defendant

A. E. PERRY, being first duly sworn, deposes and says:

1. That he is the defendant in the above entitled matter, pending before and in the above Court.

2. That when this cause was previously before this Court for trial during the October 1957 Term affiant supported a Motion for Removal of Cause with an affidavit dated the 28th day of October, 1957, and which affidavit was made a part of the record in this cause; that the contents of the said affidavit are relevant upon the instant motion for Removal of Cause and are supportive thereof, said contents being a true and accurate account of factual matters which existed contemporaneously with the indictment of affiant; that affiant incorporates the full contents of his affidavit of October 28, 1957, into the instant affidavit by reference thereto with the same effect as if affiant has placed said affidavit into this paragraph word for word; that affiant respectfully requests that the said prior affidavit be read as an integral part of this paragraph.

3. That shortly after the concluding of the trial of affiant on November 1, 1957, a petition against affiant was signed by many hundreds of people of this County; that affiant is informed and believes and so alleges that the signers of said petition number more than three thousand adult persons of this County who are presumably qualified for jury service and who have wide, intimate and influential contact with all persons qualified for jury service in this County; that signatures for said petition were solicited upon County property, to wit, upon the grounds surrounding this very court house; that affiant is informed and believes and so alleges that this petition was inspired and circulated by Union County members and sympathizers of the Ku Klux Klan, which is an organization of white persons who are dedicated to persecution, oppression and intimidation of members of affiant's race, to wit, the Negro race; that affiant is informed and believes and so alleges that the signing, circulation and presentment of said petition against him was in furtherance of the above mentioned Klan's policy and programme of oppression, persecution and intimidation of members of affiant's race; that affiant is informed and believes and so alleges that this petition was submitted to the County Commissioners of this County, in whose files it now reposes.

4. That accounts of this petition appeared in newspapers which circulated in and around Union County, North Carolina; that one of the said accounts, which appeared in THE MONROE ENQUIRER, for its issue of Monday, November 11, 1957, reads as follows:

"PETITION CIRCULATED

Between 1,000 and 1,500 persons were reported to have signed a petition here Saturday asking that local Negro integrationists be forced to leave Monroe. The petition

is aimed at Robert F. Williams, president, and Dr. A. E. Perry, vice-president of the Monroe National Association for the Advancement of Colored People. The petition says: 'We the undersigned do here and now demand that the city of Monroe, county of Union, in the State of North Carolina, with all deliberate speed and due process of law order Dr. A. E. Perry and Robert F. Williams, both office holders in the Communist inspired NAACP, to leave and not return to the City of Monroe."

That the said account appeared on page One of said paper and in column four of said page; that the MONROE ENQUIRER is printed twice per week in Union County, North Carolina, and is reputed to sell more papers in Union County than any other locally printed paper; that similar accounts of this petition were printed in other newspapers which have circulations in Union County; that a copy of THE MONROE ENQUIRER for Monday, November 11, 1957, is attached to this paragraph as Exhibit #1.

5. That affiant, who is a young Negro doctor, is indicted for the crime of performing a criminal abortion upon the person of a young white woman of Union County, and the charge has attracted wide attention and notoriety in this County; that in view of this circumstance, and the matter pointed out in this affidavit and the prior affidavit which is incorporated herein, affiant verily believes and so alleges that he cannot secure a fair and impartial trial in Union County or by a jury from some other County, if said trial is conducted in Union County; that affiant verily believes and alleges that his rights to a fair trial, as guaranteed by Article I, Section 17 of the Constitution of the State of North Carolina, and as guaranteed by the Due Process and Equal Protection Clauses of the 14th Amendment to the

Federal Constitution, require that the cause against him be transferred to some other impartial county for trial therein by an impartial jury.

This 25 day of August, 1958.

ALBERT E. PERRY, Affiant.

Subscribed and sworn to before me,
this 25th day of August, 1958.

REBECCA C. GARRISON
Official Title: Asst. Clerk Superior Court, Union County, N. C.

(SEAL)

Answer to Motion for Removal of Cause

IN THE

SUPERIOR COURT

STATE OF NORTH CAROLINA
COUNTY OF UNION

STATE OF NORTH CAROLINA

vs.

A. E. PERRY, Defendant

Now comes M. G. Boyette, the duly elected, constituted and acting Solicitor for the State of North Carolina and for the Twentieth Judicial District of the State of North Carolina in which Union County is one of the counties under the jurisdiction of the undersigned as Solicitor, and showeth forth unto the Court as follows:

1. That paragraph 1 of the Motion for Removal of Cause is admitted.

2. That paragraph 2 of the Motion for Removal of Cause is admitted.

3. Answering paragraph 3 of the Motion for Removal of Cause, the State says that the allegations of paragraph 3 contained in such motion are admitted and in further answer to said paragraph the State says and alleges that the opinion rendered in the aforesaid case will speak for itself.

4. That all of the allegations of paragraph 4 of the Motion for Removal of Cause are denied.

5. That all of the allegations contained in paragraph 5 of the Motion for Removal of Cause are untrue and the same are denied.

WHEREFORE, the State by and through the undersigned duly constituted officer of the State, moves the Court that the Motion for Removal of Cause as filed by the defendant in this action under date of August 25, 1958, be denied and that said motion be dismissed. In support of this answer to motion, the undersigned, as a constitutional authority of the State of North Carolina and acting by and through such authority does hereby move the Court that the Motion for Removal of Cause as filed in this case be denied and dismissed; and in support of this answer the undersigned has hereto appended and attached his own affidavit in response to the affidavit heretofore filed by the defendant in the cause and as attached to his Motion and filed as a part thereof on August 25, 1958.

This the 27th day of August, 1958.

/s/ M. G. BOYETTE
M. G. Boyette, Solicitor,
20th Judicial District of N. C.

Transfer of Case From Union to Stanly

IN THE

SUPERIOR COURT

NORTH CAROLINA
UNION COUNTY.

STATE OF NORTH CAROLINA

vs.

ALBERT E. PERRY, Defendant

ORDER

This matter coming on before the undersigned, upon motion filed by defendant in the above entitled cause praying removal of said cause from the County of Union to some adjacent county for trial; and it appearing to the Court from said motion, supported by affidavits, as well as from the answer filed to said motion and argument of counsel, and the Court finding as a fact that there is probable ground to believe that defendant cannot receive and have a fair and impartial trial in Union County, because of the notoriety said matter has received in and around said county; and it further appearing to the Court, and the Court finding as a fact that the ends of justice would better be met by removing said cause to some adjacent county.

It is, therefore, ordered and decreed that the above cause be, and the same is hereby removed and transferred to the Superior Court of Stanly County for trial, at the term of court of said county scheduled to convene on the 24th day of November, 1958, or such other term at which it may be calendared, in the manner and form as by law provided.

This 27th of August, 1958.

/s/ HUBERT E. OLIVE
Judge, Presiding.

Motion to Quash and Dismiss Bill of Indictment

IN THE

SUPERIOR COURT

NORTH CAROLINA
STANLY COUNTY

STATE

VS.

A. E. PERRY

NOW COMES A. E. PERRY, defendant in the above entitled cause, through and by his counsel, the undersigned, and shows unto the Court the following:

1. That immediately following his indictment on the 20th day of October, 1957, by the Grand Jury of Union County, for an alleged violation of North Carolina General Statutes 14-45, to wit, for the crime of "using drugs or instruments to produce miscarriage or to injure a pregnant woman," and before entry of a plea to the indictment which was returned against him by the Grand Jury of Union County, he made MOTION in the Superior Court of Union County, to QUASH AND DISMISS BILL OF INDICTMENT; that the Motion as made by defendant in October, 1957, reads as follows:

"NOW COMES ALBERT E. PERRY, defendant in the above entitled cause, through and by his counsel, the undersigned, and shows unto the Court the following:

1. That on the 28th day of October, 1957, he was indicted by a Grand Jury in and for Union County upon

a charge of violation of General Statutes 14-45, to wit, for the crime of 'using drugs or instruments to produce miscarriage or injure a pregnant woman.'

2. That the Bill of indictment returned against him, as aforesaid in paragraph 1 above, is void, illegal and unconstitutional for the reason that members of defendant's race, to wit, the Negro race, are systematically excluded from service upon Grand Juries in Union County because of their race and color, and have been so excluded from service upon Grand Juries in Union County for a long period of time; that members of defendant's race, to wit, the Negro race, were systematically excluded because of their race and color, from service upon the particular Grand Jury which indicted him, as set forth in paragraph 1 above; that the systematic exclusion of members of defendant's race from the Union County Grand Juries and from defendant's indicting Grand Jury is a violation of defendant's rights under the Due Process and Equal Protection Clauses of the Federal Constitution and under Section 17 of Article I of the North Carolina Constitution.

3. That a full inquiry should be made into this matter by the Court in order that defendant's rights may be fully and adequately protected; that, in aid of a full inquiry into this matter, this Court should issue or cause to be issued such orders, writs and processes as are necessary for the defendant to investigate and demonstrate the matter set out in paragraph 2 above, to the end that the defendant's rights may be fully and adequately protected.

WHEREFORE, defendant moves the Court:

(1) That the indictment and charges therein against him be quashed and dismissed, by reasons of the matter set out in paragraph two of this Motion;

(2) That inquiry be made into the matter set out in paragraph two of this Motion, in order that defendant's rights may be fully and adequately protected;

(3) That, in aid of a full inquiry into the matter set out in paragraph two of this Motion, this Court issue or cause to be issued such orders, writs and processes as are necessary for the defendant to investigate and demonstrate the alleged violation of his constitutional rights;

(4) For such other and further relief as to the Court may seem just and proper.

This ..... day of October, 1957.

/s/ Taylor & Mitchell
Raleigh, North Carolina

/s/ Major S. High
Greensboro, North Carolina

/s/ J. H. Rennick
Wadesboro, North Carolina."

that defendant's Motion was overruled by the Superior Court of Union County, by the trial judge, who did not allow defendant to substantiate the same; that after entry of plea, the defendant was tried upon said bill of indictment, which trial resulted in his conviction.

2. That defendant's cause was duly appealed to the Supreme Court of North Carolina, upon which appeal defendant assigned as error, the failure of the trial court to allow him time and opportunity to substantiate his Motion to Quash and Dismiss, which is set out in paragraph 1 above; that in a Judgment and Opinion filed on the 7th day of May, 1958, the Supreme Court of North Carolina reversed the Judgment and Verdict entered by the trial court, to wit,

Superior Court of Union County, and directed that "in the Superior Court that defendant would have opportunity to present the evidence, if any, that he may have as to the alleged racial discrimination in the Grand Jury panel"; that the Opinion of the Supreme Court of North Carolina upon defendant's appeal is reported in the following volumes: 248 NC 334, 102 SE 2d 404; that the Judgment and Opinion of the Supreme Court of North Carolina was duly certified and transmitted to the Superior Court of Union County; that said Judgment and Opinion of the Supreme Court of the State of North Carolina is respectfully requested to be made a part of this paragraph to the same effect as if herein specifically set out.

3. That during the August 1958 Term of Superior Court in Union County, Honorable Hubert E. Olive, Judge Presiding, entered an Order removing this cause to the Superior Court of Stanly County, upon defendant's motion and pursuant to authority contained in North Carolina General Statutes 1-84; that this cause was removed from the Superior Court of Union County to the Superior Court of Stanly County on October 8, 1958, by Honorable J. Hampton Price, Clerk of the Superior Court of Union County.

4. That defendant still asserts and alleges that the indictment against him is unconstitutional by reason of matter set forth in his original Motion of October, 1958, and which is set forth in full in paragraph 1 above; that defendant hereby incorporates the full text of his Motion of October, 1958, to Quash and Dismiss bill of indictment in this paragraph and refers thereto to the same effect as if herein specifically set out; that defendant is in need of subpoena and Subpoena Duces Tecum for certain County officials from defendant must elicit evidence in substantiation of his Motion; that, in particular, defendant desires the presence of the Clerk of Court of Union County, the County Commis-

sioners of Union County, the Tax Collector of Union County, the Sheriff of Union County and the County Accountant of Union County as witnesses—all of whom are necessary in order for defendant to substantiate his claim and assertion that members of his race, to wit: the Negro race, were purposefully excluded because of their race, from the Grand Jury which indicted him; that, in addition to the presence and testimony of the above indicated persons, defendant is desirous of obtaining certain records, documents and papers pertaining to Union County Grand Jury compositions since 1936, through the present year and the said records, documents and papers are necessary to the defendant for the substantiation of his claim and assertion that members of his race were unconstitutionally excluded from the Grand Jury which indicted him; that defendant is desirous of obtaining the presence and testimony of other witnesses not indicated above, whose presence and testimony may be necessary for the substantiation of the above mentioned claim and assertion.

5. That defendant has attached to this Motion an Affidavit in support hereof; that reference is also made to the Affidavit of Samuel S. Mitchell, dated the 30th day of October, 1957, in support of the October, 1957, Motion to Quash and Dismiss the bill of indictment against the defendant; that defendant hereby respectfully request that the above mentioned Affidavit of October 30, 1957, be read in support of the instant Motion.

WHEREFORE, defendant moves the Court:

(1) That his October, 1957, Motion to Quash and Dismiss bill of indictment, be considered in this Motion as fully renewed in every respect and for all of the relief prayed for in the Motion of October, 1957, and defendant hereby renews his Motion of October, 1957, in its entirety;

(2) That defendant be granted any and all processes as are necessary and as are indicated in paragraph 4 above, to aid in a full inquiry into his claim and assertion that members of his race, to wit, the Negro race, were purposefully and unconstitutionally excluded from the Grand Jury which indicted him;

(3) That this Court allow defendant to fully present his claim and assertion, as indicated above, and that this Court make full inquiry into the matter set out in the preceding paragraph of this Motion;

(4) For such other and further relief as to this Court may seem just and proper.

This 7th day of November, 1958.

TAYLOR & MITCHELL
125 E. Hargett St.
Raleigh, N. C.
Attorneys for Defendant.

Affidavit

IN THE

SUPERIOR COURT

NORTH CAROLINA
STANLY COUNTY

STATE OF NORTH CAROLINA

vs.

A. E. PERRY

SAMUEL S. MITCHELL, being first duly sworn, deposes and says:

1. That he is one of the attorneys for A. E. Perry, defendant in the above entitled cause; that defendant A. E. Perry is a Negro physician who maintains residence and offices in the City of Monroe, Union County, North Carolina; that the defendant A. E. Perry was indicted in October, 1957, by the Union County Grand Jury for the alleged crime of performing a criminal abortion upon the person of a young white woman, to wit, one Lillie Mae Rape, in violation of North Carolina General Statutes 14-45.

2. That affiant has made inquiry and is informed, and verily believes upon such information, and therefore alleges, that the said Grand Jury which indicted defendant, to wit, the Grand Jury of Union County, was unlawfully constituted, for that persons of the Negro race in Union County were excluded from the Grand Jury which indicted defendant and have been systematically excluded from

Grand Juries in and for Union County over the years, solely and wholly on account of their race or color; that, therefore, the aforesaid indictment of defendant is fatally defective.

3. That affiant has personally inspected the Grand Jury list in Union County for the past 22 years in conjunction with other persons who are familiar with the names and racial identity of members of the Union County Grand Jury for the past 22 years; that based upon the results of this investigation as well as upon other investigations and data and information available to affiant, affiant is convinced that members of defendant's race, to wit, the Negro race, were purposefully and unconstitutionally excluded from the Grand Jury, which indicted defendant, in violation of defendant's rights under Section 17, Article I of the Constitution of North Carolina and the Equal Protection Clause of the Federal Constitution, and that evidence which defendant's attorneys propose to adduce in defendant's behalf, upon hearing of Motion to Quash and Dismiss the Indictment, will conclusively indicate that members of defendant's race were purposefully and unconstitutionally excluded from the Grand Jury which indicted defendant.

SAMUEL S. MITCHELL, Affiant.

Subscribed and sworn to before me,
this 7th day of November, 1958.

(SEAL) AGNES K. PARKER,
Notary Public.

My commission expires: 7/11/59.

Order Overruling Motion to Quash and Dismiss

IN THE

SUPERIOR COURT

NOVEMBER 1958 TERM

NORTH CAROLINA
STANLY COUNTY

STATE OF NORTH CAROLINA

VS.

A. E. PERRY, Defendant.

ORDER

This cause being regularly calendared and called for trial before Hon. Hubert E. Olive, Judge Presiding (This case heretofore as will appear of record having been transferred from Union County, North Carolina, to Stanly County, North Carolina, for trial), the defendant before pleading to the Bill of Indictment renewed his motion to quash the Bill of Indictment upon grounds of alleged systematic and arbitrary exclusion of members of the Negro race, of which race he is, from jury duty in Union County, North Carolina, at the October 1957 Term of Superior Court of that county at which term the Bill of Indictment in this case was found and returned by the Grand Jury as a True Bill.

The Court heard the evidence offered by the movant and the State upon the defendant's said motion, and thereupon found facts as follows:

1. That the said Grand Jury at the October 1957 Term of Union County Superior Court was regularly drawn and

constituted as provided by the North Carolina Statute, and there was no systematic, purposeful, intentional or arbitrary exclusion of any qualified person from said jury by reason of race, or otherwise.

2. That adult Negroes constitute approximately 12½% of the total adult population of Union County, North Carolina.

3. That although there was no member of the colored race on the Grand Jury of Union County in 1957 (the Grand Jury of said county was chosen for a period of one year as provided by law), members of the colored race served on the said Grand Jury at various times before and subsequent to 1957; and members of the colored race have served on the trial panel of said court regularly before, including and subsequent to 1957.

4. That no evidence was offered by movant that any qualified person to serve as a juror was wrongfully excluded from serving on the Grand and Petit Juries of Union County at any time.

5. That the Bill of Indictment in this case was regularly and legally found and returned by a duly and legally constituted Grand Jury of Union County, North Carolina, at the October 1957 Term of Superior Court of said county.

6. That none of movant's constitutional rights was violated or abridged in the selection of the Grand Jury which found and returned the Bill of Indictment in this case.

It is therefore considered, ordered and adjudged that the motion of defendant to quash the bill of indictment in this case found and regularly returned by the Grand Jury of Union County at the October 1957 Term of Superior Court of said county be, and the same is hereby overruled.

/s/ HUBERT E. OLIVE
Judge Presiding.

Exceptions to Findings of Fact in Order Overruling Motion to Quash

IN THE

SUPERIOR COURT

NORTH CAROLINA
STANLY COUNTY

STATE OF NORTH CAROLINA

VS.

A. E. PERRY

The defendant A. E. Perry, through and by his attorneys, files the following Exceptions to the written Order of Honorable Hubert E. Olive, Judge presiding, which order was entered subsequent to the Court's overruling the defendant's Motion to Quash and Dismiss Bill of Indictment:

1. The defendant objects and excepts to Finding of Fact #1 in that said finding of fact is contrary to the evidence offered by movant-defendant A. E. Perry, and to all of the evidence adduced during the hearing upon his motion to quash and dismiss bill of indictment.

2. The defendant objects and excepts to Finding of Fact #3 in that said finding of fact is contrary to the evidence offered by movant-defendant A. E. Perry, and to all of the evidence adduced during the hearing upon his motion to quash and dismiss bill of indictment.

3. The defendant objects and excepts to Finding of Fact #4 in that said finding of fact is contrary to the evidence

offered by movant-defendant A. E. Perry, and to all of the evidence adduced during the hearing upon his motion to quash and dismiss bill of indictment.

4. The defendant objects and excepts to Finding of Fact #5 in that said finding of fact is contrary to the evidence offered by movant-defendant A. E. Perry, and to all of the evidence adduced during the hearing upon his motion to quash and dismiss bill of indictment.

5. The defendant objects and excepts to Finding of Fact #6 in that said finding of fact is contrary to the evidence offered by movant-defendant A. E. Perry, and to all of the evidence adduced during the hearing upon his motion to quash and dismiss bill of indictment.

And, the movant defendant A. E. Perry, through and by his attorneys, hereby files the following EXCEPTIONS to the failure of the Trial Court to find facts in the following manner:

6. The defendant objects and excepts to the failure of the Trial Court to find that members of the defendant's race, to wit, the Negro race, have been systematically and wrongfully excluded from serving on grand juries in Union County for more than twenty consecutive years, including the grand jury impaneled in 1957, and which indicted defendant.

7. The defendant objects and excepts to the failure of the Trial Court to find that members of the defendant's race, to wit, the Negro race, were systematically and wrongfully excluded from the grand jury that indicted the defendant.

8. The defendant objects and excepts to the failure of the Trial Court to find from the facts, that only one Negro had served on grand juries in Union County between the years 1936 and 1957, systematic and wrongful exclusion of

Negroes from the grand juries in Union County and particularly from the Union County grand jury impaneled in 1957.

And defendant further files the following EXCEPTION to the written Order of the Court overruling his Motion to Quash and Dismiss Bill of Indictment.

9. The defendant objects and excepts to the written Order of the Court overruling his Motion to Quash and Dismiss as being contrary to evidence and contrary to law.

This 23rd day of December, 1958.

/s/ TAYLOR & MITCHELL.
Of Counsel for Defendant A. E. Perry.

Plea, Jury, Trial, Verdict and Judgment

MINUTE DOCKET 26, Page 125

TD#793—Criminal Abortion

STATE

vs.

A. E. PERRY

Plea—Not Guilty.

Finding by the following Jury: Clyde F. Hatley, Marvin D. Furr, Jasper Hudson, Walter Crayton, Vernon Hill, Bain O. Talbert, C. H. Beachum, Giles Forrest, John Hugh Burleson, Connis S. Huneycutt, Robert C. Hill and Vonderyl Hall. Guilty as charged:

Let the defendant be confined in the State Prison at Raleigh for a period of not less than 2 nor more than 3 years.

Appeal Entries

IN THE

SUPERIOR COURT

NOVEMBER CRIMINAL TERM 1958

NORTH CAROLINA
STANLY COUNTY

STATE OF NORTH CAROLINA

VS.

A. E. PERRY, Defendant

Upon the coming in of the verdict the defendant moves to set the same aside as being against the weight of the evidence. Motion denied. Exception.

Upon the pronouncement of the judgment the defendant objects and moves for a new trial for errors committed during the trial. Motion denied. Exception. The defendant in open Court gives notice of appeal to the Supreme Court. Further notice waived.

The defendant is allowed 45 days in which to make up and serve case on appeal. The State is allowed 30 days thereafter to serve countercase or file exceptions.

Appeal bond in the sum of $150.00 adjudged sufficient. Appearance bond in the sum of $3,000.00 adjudged sufficient.

This the 28th day of November, 1958.

/s/ HUBERT E. OLIVE
Judge Presiding.

Court Adjourned
Sine Die

Clerk's Certificate

IN THE

SUPERIOR COURT

NORTH CAROLINA
STANLY COUNTY

STATE

VS.

A. E. PERRY

CERTIFICATION OF RECORD ON APPEAL

I, EVERETT G. BEAM, Clerk of Superior Court of Stanly County, State of North Carolina, do hereby certify that the foregoing annexed papers are and constitute a true, perfect and exact transcript of the record in the cause entitled "State of North Carolina v. A. E. Perry," which Cause was removed from the Superior Court of Union County to this Court for trial and which was tried in this Court during the November 1958 Criminal Term.

EVERETT G. BEAM
Clerk, Stanly County, Superior Court.

(SEAL)

Testimony

J. HAMPTON PRICE testifies for Defendant:

Direct Examination: Counsel for Defendant

Witness: My name is J. Hampton Price and I am the Clerk of the Superior Court of Union County, I am presently serving in that position, and have been serving in that capacity for nine years. Prior to my position as Clerk, I was serving as County Tax Collector of Union County and I served in that capacity for about 13 years. As Clerk of Court, I carry the Jury Book up to the Court and when the jury is drawn by a child under six years of age, it is my duty to inform them of those who have served on the jury within the last year. That is done with both the Grand and Petit Jury. I keep the jury book in the Clerk of Court's office.

I have the jury book with me. This book covers from 1941 up until the present date. I do not have the jury book prior to 1941. I think the Minutes took care of the jury up until that time. I was not Clerk of the Superior Court prior to that time. I presume that the Minute Docket took care of the ones that were on the jury. I do not get the prospective jurors that are going to serve, that is the County tax supervisor. The names are handed down to me by the County tax supervisor. The tax supervisor certifies them to me. The tax supervisor hands me down by the Board of County Commissioners, as drawn out by a child under six years of age, and as recorded in the Minute Docket. He is Clerk to the Board of County Commissioners and keeps the minutes. They are handed down to me by typewritten paper. I do not have those lists since 1936, but I have them on the Jury Book after he gives me the list, I record them on the Jury Book. The names that appear

on the Jury Book are the names of all persons whose names appear on the County Tax Collector's list, and I keep a list of the ones who serve. Their names are entered on the Jury Book in order to keep a permanent list of the jury and to keep a record of those who serve on the jury in Union County.

I get in February a list of 48 names. We have a 12 months Grand Jury and I get a list of the panel of 48 names. Those 48 names are carried up into open Court and the first 18 are drawn out of the hat by a child under six years of age and they compose the Grand Jury. All 48 names are listed on the jury book. The remainder of the 48, after 18 goes on the Grand Jury, serve as the petit jury. I keep a separate list in the Minute Book of the members of the Grand Jury. Each February when the Grand Jury is drawn, the names are recorded as Grand Jurors who served. Each 12 months we get a new Grand Jury. That has been true ever since I have been Clerk of Court.

I have the jury book back to 1941. I also have the Minute Docket Book to 1936. I have the Minute Dockets back to 1936 that will show the names of every juror of every person served as a Grand Juror back in 1936. You presented a list of names of the Grand Jurors from 1936 through the present year for certification and at that time I said there were certain errors, certain typographical errors, spelling of names. I have a copy of that list that was sent to me. I don't have the corrected copy, except it was double check, and I have the errors here. It is most errors in the spelling of the names.

Court: This was submitted to Mr. Price; why didn't you go over it; why didn't you get it done before now?

Counsel for Defendant: If it pleases the Court, we submitted it to him and asked him to certify it for us.

Court: I understand he told you there were errors in it.

Counsel for Defendant: Course we didn't know what errors he was talking about.

Witness: I have a copy of my letter in answer.

Court: Wait just a minute. This is on August 19th he notified you. Why didn't you go back to him when Court was over and get this changed rather than wait in Court for him to go over this?

Counsel for Defendant: We did to keep from going through the whole book.

Court: What you want to do is go through all this, now, take the time of the Court. Just make typographical errors.

Court: I understand practically all are typographical, maybe misspelling of names; any real errors, any wrong names?

Witness: One name was omitted, Juror #15. Alexander Little was omitted from the certified copy. There were only 17 Jurors named on the copy. This was in February mixed 1953 Term Minute Docket 25, page 139. There were other names omitted from the entire list of the jurors from '36 to present. In February, 1950, juror #2, H. C. Price; Juror #10, James H. Bass, was omitted. There are names misspelled on Minute Docket 21, page 265, E. W. Killough was misspelled H-i-l-l-o-u-g-h. I imagine it's 1936, that is where we started. Embree Gulledge is spelled E-m-e-r-e-e, that is the correct spelling.

Minute Docket 22, page 1, F. T. Richardson is put down as T. T. Richardson, it should be F. T. Richardson. Minute Docket 22, page 147, Sam Taylor is spelled T-a-y-l-e-r. January Criminal, 1940, Term, Minute Docket 22, page 147. He had it Minute Docket 21. It should be Minute Docket 22. Now, Minute Docket 22, page 147, certified copy shows page 3, Minute Docket 22, page 337, Brady Privett is spelled Brady P-r-i-h-e-t-t. Same Minute Docket:

Boyce Helms is spelled B-o-y-e-e, which is incorrect. Minute Docket 22, page 373, D. C. Laney is spelled L-a-n-e-y. The correct spelling is Laney.

Minute Docket 22, page 577, H. E. Copple, Jr. is spelled H. E. C-a-p-p-l-e. That is incorrect. C-o-p-p-l-e is correct. L. S. Pigg is spelled L. S. P-r-i-g-g, which is incorrect. Earl Eason is spelled Earl F-a-s-o-n. Earl Eason is correct. L. C. Horton is listed as L. G. Horton. H. C. Horton is correct. J. B. Austin is listed J. B. A-u-s-t-o-n. Austin is correct. Minute Docket 23, page 50, G. H. Clontz is spelled C-l-o-n-t-y. G. H. Clontz is correct. Minute Docket #23, page 140, Millon C. Pigg is spelled on the list Milton C. Pigg. The correct spelling is M-i-l-l-o-n C. Pigg. W. Hoyt Maness is listed as W. K-a-y-t. W. Hoyt, H-o-y-t is correct. Minute Docket 23, pages 426 and 427, William A. Wiley is spelled William H. Wiley. William A. Wiley is correct.

Minute Docket 24, page 162, February Mixed 1950 Term; that is where the omitted names were. Arthur J. Courtney is spelled C-o-a-r-t-n-y. Courtney is correct. Komp Eudy is spelled K-e-m Eudy. James O. Hunter is listed as James P. Hunter. James O. Hunter is correct. Barran L. Greene is spelled as B-a-r-r-n L. G-r-a-n-e. Barran L. Grane is spelled as B-a-r-r-o-n L. Grane. J. S. Kerr is spelled J. S. K-e-m. William A. Safley is correct. You had William A. Safley. Ben A. Horne is named and sworn as Foreman, not just "Ben Horne," as appears on copy. Ben A. Horne is correct as Foreman of the Grand Jury. That is all the corrections I have.

The corrections I have indicated were made by comparing this list with the actual Minute Docket that I have. With these corrections, I will certify that this is an accurate list of Grand Juries from 1936. I had nothing at all to do with Grand Juries during my term as County Tax Collector. I was in charge of the tax books during that

time. We keep our tax book separate according to color and race. We have the books and they are alphabetically arranged and the whites come first and the colored come alphabetically in the same book. The names are kept separate according to race. As County Tax Collector, the County Accountant borrowed the book and had a copy made.

I am familiar with most of the names on this list, but only for the nine years that I have been Clerk of Court. I was Clerk of Court when the Grand Jury list was made in 1950 and I am familiar with most of the names on that list. From 1950, including 1951, 1952, 1953, 1954, 1955, 1956, 1957, and 1958, as to who on these lists are colored, we will come up to the year 1954. Minute Docket 25, page 345, the name of Ike Montgomery was on the Grand Jury; that was in 1954. We will come up to 1958; the name of Lex Houston. There were other names in the panel but when you are drawing them by lot and when there is such a small ratio between white and colored people in Union County, it is not always possible to get a colored man on the Grand Jury. That from the year 1950 and including the years 1950 through the year 1958, and including the year 1958, there were only two Negroes who served on the Grand Jury. Lex Houston is on the Grand Jury that is now sitting. There were no Negroes on the Grand Jury in Union County in 1957. There were none in 1951, 1952, 1953, 1955, 1956 or 1957.

I would know some of the people before I became Clerk of Court and I know a good many of them. I cannot answer authoritatively because I wasn't associated with the Court. However, I don't see any here that I think were colored. I don't know, I don't know the fellow by the name of Vann Helms; we have a lot of Helmses in Union County. He is the only one I don't know of the 17

that appear there for 1949. There were no colored—all white.

In 1948, there is a Hoyle Helmes, and I don't know if he is colored or white. There are a lot of them and some are white and others colored. Other than that, they are all white; none are colored. In the year 1947 they are all white. In 1946 they are all white. In 1945 there is one W. I. Helms; I don't know if he is white or colored, but all the others are white. In the year 1944 they are all white. In 1943, I would say they were all white. In 1942, there is a name of Curtis Smith and I think we have a Curtis Smith, white, and a Curtis Smith, colored; other than that name the other 17 are white. In 1941 they are all white. I would say in 1940 they are all white. In 1939 there was another Curtis Helms; I don't know if he is white or colored, but the other 17 are white. In 1938 there is the name of J. W. Helms, No. 7, and I would not say whether he is white or colored, but the other 17 are white. In 1937 the name of E. C. Helms, No. 16, I would not say whether he is white or colored. The rest of them are white. In 1936, I'd say they are all white. To the best of my knowledge, Ike Montgomery was the first Negro to serve on the Grand Jury during this period of time covered here. I cannot recall any other person before 1958 who served on the Grand Jury. Prior to the time then that this bill of indictment was taken out, in October 1957, Ike Montgomery was the only one who had served on the Grand Jury in Union County to my knowledge. With the exception of the corrections made, I will certify this list.

Solicitor for State: We don't want to ask him any questions at the present; we might want to recall him a little later.

B. F. NIVEN testifies for the defendant:

Direct Examination: Counsel for Defendant.

Witness: My name is B. F. Niven, and I hold the official position as County Tax Collector in Union County. I have held that position for eight years. I was served with subpoena in connection with this trial and was told to bring my records for the past 25 years. We have the ledgers for about 21 or 22 years. We have scrolls for the last four years, which are the same records; it is the same record, but different form book.

I think I have them all here. If it doesn't make any difference what year, I can start on a certain year. As to race, they are all in the same ledger but the whites come first in the township. They are alphabetical. We divide them by township. We have nine townships. All the whites in a certain township are alphabetically first, followed by the colored alphabetically in the same book. The names of the townships are as follows: Lanes Creek, Buford, Jackson, Sandy Ridge, Vance, Goose Creek, New Salem, Marshville and Monroe. This ledger is for the year 1945. Well, the numbers run straight through. The total in Lanes Creek, white and colored, 522. Of the 522, 440 are white; the rest are colored. In Buford Township the total of both is 1,067. Of that 1,067, 980 are white; the rest colored.

Jackson Township has a total of 771. The total white is 585 of that 771. Sandy Ridge Township has a total of 787. Of that number there are 626 whites; the rest colored. Vance Township totals 672; 634 are white; the rest are colored. Goose Creek Township has a total of 112; 1023 are white. New Salem Township has a total of 729 and 676 are white. Marshville Township has a total of 1,363; 1,073 are white. In Monroe Township there are 3,046 whites and 690 colored. That is for the year 1945.

In Lane Creek has a total of 642; whites 520 and colored 122. Buford Township has a total of 1,146—1,027 white. Jackson Township has a total of 813, white 811. Sandy Ridge Township has a total of 730, whites 635. Goose Creek Township has a total of 1,165, white 1,063. New Salem Township has a total of 795, whites 762. Marshville Township has a total of 1,479, white 1,197. Monroe Township, 3,291 white, colored 560. Vance Township has a total of 730. Let me give you Sandy Ridge, just change that to Vance. Let me give you Sandy Ridge. Sandy Ridge, total of 840, whites 835. This is 1,935. Lanes Creek Township has a total of 556, whites 470. Buford Township has a total of 1,202, total whites 1,108. Jackson Township a total of 854, whites 672. Sandy Ridge Township, a total of 889, whites 722. Vance Township, a total of 884, whites 836. Goose Creek Township, a total of 1,286, whites 1,187. New Salem Township, a total of 738, 688 whites. Marshville Township, a total of 1,703, whites 1,362. Monroe Township, whites 4,268, colored 833.

In 1952, Lanes Creek Township, a total of 539, whites 456. Buford Township, a total of 1,224, white 1,097. Jackson Township, a total of 882, whites 705. Vance Township, a total of 868, whites 813. Goose Creek Township, a total of 741, whites 688. Marshville Township, a total of 1,692, and whites 1,356. Monroe Township, whites 4,232, colored 868. That is for the year 1952.

In 1946, Lane Creek Township, a total of 536, whites 447. Buford Township, a total of 1,151, whites 1,016. Jackson Township, a total of 809, whites 648. Sandy Ridge Township, a total of 822, whites 655. Vance Towaship, a total of 1,146, whites 1,054. New Salem Township, a total of 741, whites 692. Marshville Township, a total of 1,646, whites 1,157. Monroe Township, whites 3,339, colored 771.

In 1942: Lane Creek Township a total of 600, whites 470. Buford Township, a total of 1,164, whites 1,032.

Jackson Township, a total of 840, whites 649. Sandy Ridge, a total of 848, whites 691. Vance Township, a total of 735, whites 696. Goose Creek Township, a total of 1,915, whites 1,091. New Salem Township, a total of 794, whites 740. Marshville Township, a total of 1,528, whites 1,208. Monroe Township, whites 3,452, colored 787.

In the year 1951: Lane Creek Township, a total of 562, whites 475. Buford Township, a total of 1,224, whites 1,105. Jackson Township, a total of 788, whites 700. Sandy Ridge Township, a total of 882, whites 699. Vance Township, a total of 853, whites 770. Goose Creek Township, a total of 1,272, whites 1,167. New Salem Township, a total of 753, whites 704. Marshville Township, a total of 1,670, whites 1,339. Monroe Township, whites 4,145, colored 866.

In the year 1947: Lane Creek Township, a total of 568, whites 476. Buford Township, a total of 1,195, whites 1,083. Jackson Township, a total of 850, whites 673. In Sandy Ridge, the total is 850 and the whites 673. Vance Township the total is 754 and the whites 710. Goose Creek Township, a total of 1,234, whites 1,139. New Salem Township, a total of 765, whites 711. Marshville Township, a total of 1,588, whites 1,252. Monroe Township, whites 3,678, colored 813. That is for the year 1947.

For the year 1950: Lane Creek, a total of 595, whites are 490. Buford Township, a total of 1,232, whites 1,105. Jackson Township, a total of 918, whites 720. Sandy Ridge, a total of 855, whites 676. Vance Township, a total of 826, whites 775. Goose Creek Township, a total of 1,280, whites 1,171. New Salem Township, a total of 792, and whites 728. Marshville Township, a total of 1,672, whites are 1,337. Monroe Township, whites 4103, colored 868. That is for the year 1950.

This is for 1949: Lane Creek Township, a total of 586, whites 486. Buford Township, a total of 1,215, whites 1,088. Jackson Township, a total of 916, whites 713. Sandy

Ridge Township, a total of 878; whites 699. Vance Township, a total of 800, whites 752. Goose Creek Township, a total of 1,256, whites 1,160. New Salem Township, a total of 774, whites 721. Marshville Township, a total of 1,648, whites 1,307. Monroe Township, whites 5,981, colored 864. That was for the year 1949.

Now, the year 1948: Lane Creek Township, a total of 569, whites 475. Buford Township, a total of 1,194, whites 1,093. Jackson Township, a total of 901, whites 715. Sandy Ridge Township, a total of 865, whites 689. Vance Township, a total of 1,265, whites 1,169. New Salem Township, a total of 765, whites 715. Marshville Township, a total of 1,665, whites 1,312. Monroe Township, whites 3,901, colored 851. That was for the year 1958.

Lanes Creek Township, a total of 622, whites 508. Buford Township, a total of 1,206, whites 1,079. Jackson Township, a total of 847, whites 650. Sandy Ridge Township, a total of 893, whites 723. Vance Township, a total of 742, 701 whites. Goose Creek Township, a total of 1,213, whites 1,119. New Salem Township, a total of 768, whites 714. Marshville Township, a total of 1,584, whites 1,259. Monroe Township, whites 3,578, colored 781.

This is the book for 1953, the tax ledger. Lanes Creek Township, a total of 537, whites 447. Buford Township, a total of 1,093, whites 976. Jackson Township, a total of 782, whites 616. Sandy Ridge Township, a total of 803, whites 645. Vance Township, a total of 672, whites 634. Goose Creek Township, a total of 1,158, whites 1,048. New Salem, a total of 744, whites 694. Marshville Township, a total of 1,412, whites 1,126. Monroe Township, whites 3,117, colored 636.

For the year 1937: Lanes Creek Township, a total of 650, whites 514. Buford Township, a total of 1,171, whites 1,181. Goose Creek Township, a total of 1,188, whites 1,072. New Salem Township, a total of 759, whites 792. Marsh-

ville Township, a total of 1,557, whites 1,238. Monroe Township, a total of 1,557, whites 1,238. Monroe Township, whites 3,306. I have the supplement of discoveries and it is 3,362, whites in Monroe Township. In Monroe Township, colored 601.

In the year 1938: Lanes Creek Township, a total of 657, whites 529. Buford Township, a total of 1,196, whites 1,057. Jackson Township, a total of 850, whites 630. Sandy Ridge Township, a total of 850, whites 677. Vance Township, a total of 766, whites 684. Goose Creek Township, a total of 1,178, whites 1,089. New Salem Township, a total of 784, whites 725. Marshville Township, a total of 1,538, whites 1,242.

Monroe Township, a total of 3,364, colored 651, the year 1939. Lanes Creek Township, a total of 614, whites 503. Buford Township, a total of 1,164, whites 503. Buford Township, a total of 1,164, whites 1,049. Jackson Township, a total of 826, whites 641. Sandy Ridge Township, a total of 828, whites 670. Vance Township, a total of 739, whites 686. Goose Creek Township, a total of 1,185, whites 1,092. New Salem Township, a total of 745, whites 707. Marshville Township, a total of 1,474, whites 1,249. Monroe Township, whites 3,289, colored 664.

For the year 1940: Lanes Creek Township, a total of 594, whites 492. Buford Township, a total of 1,177, whites 1,060. Jackson Township, a total of 833, whites 639. Sandy Ridge Township, a total of 797, whites 640. Vance Township, a total of 723, whites 684. Goose Creek Township, a total of 1,212, whites 713. Marshville Township, a total of 1,542, whites 1,247. Buford Township, a total of 1,112, whites 993. Jackson Township, a total of 788, whites 620. Sandy Ridge Township, a total of 801, whites 631. Vance Township, a total of 659, whites 619. Goose Creek Township, a total of 1,154, whites 1,055. New Salem Township, a total of 753, whites 688. Marshville Township, a

total of 1,409, whites 1,119. Monroe Township, whites 3,120, colored 682.

For the years 1954, 1955, 1956, 1957, and 1958, we have to use the scrolls, the ledger is made from the scroll. It is the same thing, except it doesn't have the receipt number at the end like the ledger does.

I have been Tax Collector for the past eight years and before that, I was Deputy Sheriff and Sheriff. I was Sheriff of Union County for 16 years, that was prior to becoming Tax Collector. I was Deputy Sheriff for about four years. In these positions, I was familiar with most of the people that lived in this County. I know two or three Vann Helmses. I know some colored Helmses but I don't know all their given names. The one Hoyle Helms I know is white. I know W. I. Helms and the one I know is white. The Curtis Smith I knew is now deceased, that is the only one I knew and he was white. I knew more than one Curtis Helms, one white and another colored. The colored one that I am thinking about, if it is the same one, was reared in Buford, but most of them, the sisters and brothers are in Monroe. I think that Curtis Helms is one of George's boys. There were several but I don't know his age. He would be over 21 years of age now.

I think at the time I knew him, in 1939, he could have lived in Buford Township or maybe Monroe; I am not sure. That was probably in his father's lifetime. I do not know if that is the same one that is listed on the Grand Jury list of 1939. The Curtis that I knew did not own property but his father did. I know J. W. Helms but I couldn't say whether one of George's boys was J. W., or not. I know two or three J. W. Helmses that are white. The two E. C. Helmses I know are white. I have nothing to do with the making of the list of jurors. My books come from the Clerk of the Board of Commissioners where they make the books. He has access of them any time he wants, a township at a

time, scroll or ledger. I think he uses the scroll, it is handier to handle. They are available to him for the purposes of taking different persons off the jury by virtue of his being County Tax Accountant. From the years 1936 through 1957, I cannot say if any Negroes served on the jury during that time. I haven't been to court since 1950. I didn't miss a court for the twenty years I was there. For the 20 years I was there drawn on the panel before and after then. For a one-week term you draw 48, for a two-weeks term you draw 48.

I cannot say that any Negroes were on the Grand Jury during my term. They were on the regular panel but the Grand Jury is selected out of the regular panel in the courtroom in the presence of the Court by a child out of a hat. The whole panel is in there. I think if a Negro had been chosen to serve on the Grand Jury I would have known it. I could not say for sure that any Negroes did not serve on the Grand Jury, but I do know that they have been on the regular juries and there could have been one on the Grand Jury, but I could not name one by name. I know Ike Montgomery. I am not sure which township he lives in but I think it is Vance. I have my scroll for the year 1954.

Cross Examination: Solicitor for the State

Witness: The Negroes and whites have also been listed separately in Union County in the tax abstracts. They have been listed separately, I guess for the purpose of identification. We have different names in the County. We have duplicate names, white and colored in the County and it is for the purpose of identifying whether they are white or colored and want to get up with them or mail a notice, etc., or want to know when they call me about their taxes. I have to ask the person calling whether he is white or colored to know where to find him in the book right away. That

fact in the books is for identifying him and convenience in finding it on the books. That practice also aid persons in getting their mail. The separation of races in the tax abstracts is not done for any racial preference.

Redirect Examination: Counsel for Defendant

Witness: I have testified that I know two or three Curtis Helms', one colored and one white. Our office does not make any distinguishment between the white Curtises. If he came in and wanted to pay Curtis Helms' taxes, if he was there in person, I would know where to look. If somebody would call and he wanted to know what Curtis Helms' taxes were, if I knew there were two, I would have to know if it was white or colored. If we have two Curtis Helms' who are white, we'll go to the trouble of looking up their original return to compare the property in his presence to see which one is right. In the event two colored persons named Curtis Helms, if Curtis came in and if I did not know, I'd look and get it, and if I did not have another Curtis Helms, I would be satisfied that he was the one that was there to pay.

Counsel for Defendant: So the Court Reporter can get these names in the minutes, the names Vann Helms for year 1949; the name of Hoyle Helms for the year 1948; the name of Curtis Helms for the year 1939; the name of J. W. Helms for the year 1938; the name of E. C. Helms for the year 1937.

Roy J. Moore testifies for the defendant:

Direct Examination: Counsel for Defendant

Witness: My name is Roy J. Moore and I am the County Tax Accountant and County Tax Supervisor. I have been in that capacity since May 15, 1935. There has been no

time that I have not been accountant since 1935. In my position, I work with the Commissioner and I serve as Clerk to the Board and then I also help prepare the budgets for approval during the late spring and summer. In my duties with the Commission I help prepare jury list. We prepare the jury list every two years in the County from the tax scroll. That is done in my office, the office force, office girls. We prepare them for men, both Negro and white. Then for women, both white and Negro, we prepare that list from the town registration precincts books. We only get the names of the women from township registration books. After we prepare the list, we present it to the Board. We take the names of all the taxpayers in the County and we have been doing that for about 10 years.

When I first went there, we were selecting on a basis of whether or not they paid their prior year's taxes. That was for a number of years. I don't know how many. Before that time, we used no other method of elimination except the prior taxes. The list that we put before the Commissioners we do not preserve, we cut them up and put it in the jury box. The list that we prepared is the actual scrolls that go into the jury box. And in taking the names from the tax books, we take the colored names from the colored section of the book. We distinguish the name from a white person who may have the same name by putting beside the name "col" and we put "col" on all of the names of colored taxpayers that we take from the box.

When the names are drawn from the jury box, we can always tell if it is colored by the "col" beside the name. The last jury box was first made up in 1957, and it is due to be made up in 1959 again and prior to 1957 it was made up in 1955.

I know Lex Houston; he is colored, but I do not know if he is serving on the Grand Jury now or not. I knew Ike Montgomery but I do not know if he is living now or not.

There have been no scrolls placed in the jury box since 1957. When they are placed before the Board, the Board authorizes the deletion of doctors and lawyers and ministers and people who have changed their addresses from the last listing period. I do not know how many Negro doctors there are in Union County, but all doctors are excluded.

Solicitor for State: The statute takes care of that.

Court: You are talking about just the ones that the statute law excludes?

Witness: Yes, sir, they are excluded.

Court: Are any others besides those?

Witness: No, sir.

Counsel for Defendant: We would like to make this observation. At this time we are trying to inquire as to procedures the Commissioners pursued. We know what the statute says. We are trying to find whether they did in fact follow the statute.

Court: That is just what he said. He said they excluded those under the statute. He said no others. That is what he says is a fact, they did.

Witness Continues: In addition to tax list, we have township precincts list. They are not kept according to race to my knowledge. They are right straight down the line. We could not determine a white person's name from a colored person's name. That notation according to the race is only made in the scrolls that are put in the jury box which came from the tax list. About 10% of the names that are placed in the jury box comes from the precinct list and that 10% is women. I have been Tax Accountant since 1935. I have a pretty good knowledge of the residents of Union County. Yes, I know one Vann Helms; the one I know is white. I also know two Hoyle Holmes' and they are both white. I don't know any colored Hoyle Holmes. I also know W. I. Helms; he is also white. I do not know a Curtis Smith.

I know two Curtis Helmses, one is white and the other is colored. The colored one lives in Buford Township, I am sure. I know him when I see him. I would recognize him but that is about all. I would say he is in his 50's, maybe late 50's. To my knowledge he has not served on the Grand Jury in Union County. I do not know the exact numbering of Negroes that has served on the Grand Jury since I have been Tax Accountant since 1935.

I have an opportunity to observe the Grand Jury because my office adjoins the courtroom there and occasionally I see them coming in and out. That is about the extent of it. And from time to time they come in and inspect my office and to look at my books. To my own knowledge, I have noticed Negroes on the Grand Juries. I believe it was either this past session or the session of '57. One came in with the divided group. They don't come all 18. Some may go to the jail and some to the courthouse. Since I have been serving as County Official I can recall seeing only one Negro serving on the Grand Jury.

Cross Examination: Solicitor for State

Witness: In the discharge of my duties as Tax Supervisor, I seldom get a chance to go to the courtroom and see the Grand Jury in action and I have had no occasion to have any contact with them during that time. I testified that when these names were taken from the Tax Books and cut into small scrolls and put in the jury box, that the Negroes had the letters "col" at the end of their names. The reason for this, I guess, is just a procedure we have had.

We also make the tax books. I am Tax Supervisor, too, and so that has been the custom throughout the years. It was that way when I was there. In my duties as the Clerk of the Board of County Commissioners, I am present when the Grand Jury is drawn and I have never assisted anyone in excluding Negroes from the Grand Juries. No Negroes

have been excluded because of his race to my knowledge. The population in Union County in 1957 was 42,000, the last Federal census; and we are estimating it picked up about 5,000. That is purely an estimate, of course, about 47,000 in our report.

Counsel for Defendant: Objection.

Counsel for Defendant: We have the official record. We will let the Solicitor see it. We intend to introduce it in evidence. We have the last census.

Solicitor for State: Perhaps you were going to bring out the same information I am trying to elicit now.

Counsel for Defendant: We have the official books.

Solicitor for State: I won't ask him any further questions at the present time. I might want to recall him.

Redirect Examination: Counsel for Defendant

Witness: I am present most of the time when the names of the jurors are drawn by the County Commissioners to serve. They are drawn, well, at least for the February panel of each year. Sometimes they are drawn as early as December, but usually it is the first regular meeting in January. In other words, we always try to draw it 20 days prior to the convening of that term of court for which the jury is drawn. After that we make out a list in our office and give it to the local papers and then give a copy to the Sheriff's Department and Clerk of Court. The names are actually drawn out of the box by a small child, boy or girl, under ten years of age.

Recross Examination: Solicitor for State

Witness: That is my signature. I am the same Roy Moore that signed that affidavit.

Solicitor for State: I'd like to identify it if your Honor please, as State's Exhibit I.

NORTH CAROLINA
UNION COUNTY

AFFIDAVIT

To the Judge Holding the Courts of the 20th Judicial District:

ROY J. MOORE, being duly sworn, deposes and says that he is the duly appointed and acting Clerk of the Board of County Commissioners of Union County, as authorized by Chapter 135 of the Session Laws of 1951; that the names of male persons selected by the Board of County Commissioners for the jury list have for many years been selected from the tax returns for the year in which the jury list is prepared in order to secure up-to-date mailing addresses of the persons selected; that the names of women selected for the jury list have been secured from the Precinct Registration Books of Union County; that the names of all male persons, without regard to race, creed or color, appearing on the tax returns and residing in Union County, except those who are known to be incompetent or have committed a crime involving moral turpitude or otherwise exempt or disqualified for jury service by reason of old age and bad health, are selected by the Board of County Commissioners for the jury list; that the names of women selected for the jury list from the precinct Registration Books are selected without regard to race, creed, color or party affiliation; that a new Jury list is selected every two years as directed in Chapter 9, *Section 1, of the General Statutes of North* Carolina.

Affiant further says that on the first Monday in June, 1955, the Board of County Commissioners was informed that the tax returns had not been completely completed and transcribed and was not available for use in preparing the jury list; that on the first Monday in August, 1955, the

completed tax returns were available for said purpose, and on said date the Board of County Commissioners, following its customary procedure, selected a new jury list; that the names selected for said jury list included all male persons residing in Union County, whose names appeared on said tax returns, except those mentioned above and a list of women secured from the Precinct Registration Books, all of which consist of several thousand names; that the names of persons selected for said jury list were copied from said tax returns as they appeared thereon, without consideration or regard to race, creed or color and the names of women selected for said jury list were selected without consideration or regard to race, creed, color or party affiliation.

Affiant further says that the names so selected were transcribed on scrolls of equal size on which was typed the name of one person, and said scrolls were placed in a compartment marked #1 in the jury box and the jury box has remained at all times in the custody of affiant, as the Clerk of the Board of County Commissioners, in the office in the courthouse of Union County.

Affiant further says that on the first Monday in January, 1957, which was more than 20 days prior to the convening of the February 1957 Term of the Superior Court for Union County, the Board of County Commissioners for Union County caused to be drawn from said jury box, out of the compartment marked #1, by a child not more than ten (10) years of age, 48 scrolls; that the persons whose names were inscribed on said scroffs were selected to serve as jurors on the Petit Jury for the February 1957 Term of the Superior Court for Union County, and on the Grand Jury for a period of one year and to be selected by the Judge presiding at the February 1957 Term of the Superior Court, as provided by law; that the names of said persons selected to serve as jurors for the February 1957 Term of the Superior Court and the Grand Jury, as above set out, were

drawn from the jury list selected by the Board of County Commissioners, on the first Monday in August, 1955.

Affiant further says that since the question of discrimination between the races has been raised, affiant has examined the names of persons selected for jury service over a period of several years past and finds that the names of persons of the Negro race have been selected by the Board of County Commissioners, and that persons of the Negro race have been selected on several occasions to serve as Petit jurors, and on the Grand jury for Union County; that the list of 48 persons selected by the Board of County Commissioners to serve on the Petit Jury and on the Grand Jury selected at the February 1957 Term of the Superior Court for Union County contained the names of at least one person of the Negro race; that in selecting the jury for the February 1957 Term of the Superior Court no effort was made by the Board of County Commissioners to discriminate against the Negro race, or to limit the number of persons of the Negro race for service upon said jury; that the preponderance of the names of white persons selected for said jury resulted entirely from the preponderance of the names of persons of the white race who executed tax returns, and who registered to vote in Union County.

RESPECTFULLY SUBMITTED

Roy J. Moore, Clerk for the Board of County Commissioners for Union County.

Sworn to and subscribed before me
this ..... day of August

.....
Notary Public.

My comm. expires:

JAMES R. BRASWELL testifies for defendant:

Direct Examination: Counsel for Defendant.

Witness: My name is James R. Braswell and I am the Chairman of the Board of County Commissioners and I have held that position for four years. The jury box has been composed twice since I have been Chairman, in 1955 and 1957. We select our jury from our tax records and from the precincts scrolls. The ladies are picked up from the precincts and course, the listing is taken from the tax and they are cut up and put in the box and at the time, they are cut up, course, some deletions are made at that time. The deletions are those that are allowed by statute and from some of them who has moved out of the County. We have quite a bit of shifting of population from year to year. I work in the Bank. I have been in the bank for about two years. Prior to that, I was in the farm machinery business. I was at one time Chairman of the Board of Education about six years ago. I have lived here since 1940, and lived in Stanly County prior to that.

Cross Examination: Solicitor for State

Witness: I have been present each time the jury has been drawn from the box. During my tenure of office, at no time has there ever been any discrimination. I have never heard any member express any discrimination against any white or colored. This is my signature on this paper.

Solicitor for State: I'd like to identify this as State's Exhibit #2.

Affidavit

North Carolina
Union County

To the Judge Holding the Courts of the 20th Judicial District:

James R. Braswell, being duly sworn, deposes and says that he is the Chairman of the Union County Board of Commissioners and has been a member of the Union County Board of Commissioners for a number of years; that for many years it has been the custom of the Board of Commissioners of Union County to select all male persons, whose names appear on the tax return, for the jury list of Union County, except those persons who are known to be incompetent, or who have committed crimes involving moral turpitude or who are legally exempt or disqualified by reason of old age and bad health, from jury service; that it has been the custom of the Board of Commissioners to select the names of women for jury service from the precinct registration books for Union County;

Affiant further says that in selecting the names of male persons for jury service, in the manner above stated, no consideration or regard is given to race, creed or color; that all names of women are selected from the precinct registration books for jury service without regard to race, creed, color or party affiliation; that the names of the white race and the Negro race selected from the tax returns are therefore in direct proportion to the names of persons of the white race and the Negro race appearing on the tax returns and the precinct registration books.

Affiant further says that on the first Monday in August, 1955, the jury list was selected and appeared in the customary manner, as above stated, without discrimination against any race; that on the first Monday in January, 1957, the Board of County Commissioners caused to be

drawn from the jury box by a child under ten years of age, 48 scrolls, under which was typed the name of one person selected, and constituting the jury list for jury service at the February 1957 Term of the Superior Court for Union County and for service upon the Grand Jury to be selected at said time and to serve for a period of one year; that the names appearing upon said 48 scrolls so drawn from the jury box, were drawn and selected for jury service, without regard to race, creed or color.

Respectfully submitted

James R. Braswell, Chairman of
Board of County Commissioners.

Sworn to and subscribed before me,
this ... day of August, 1958.

My commission expires:

.....

Notary Public.

Deputy Sheriff Shelly Griffin testifies for defendant:

Direct Examination: Counsel for Defendant

Witness: I am Deputy Sheriff Griffin and my initials are D.S. I have been Deputy Sheriff for eight years. Prior to that, I was with the Police Department for six years. I know a few people in Union County. I live in Monroe Township. My job consists of serving witnesses subpoena and summoning jurors. I know Vann Helms; there are two or three Van Helmses. The ones that I know are white. I know a Hoyle Helms; the one I know is also white, and I believe he lives in Monroe Township, but I do not know W. I. Helms and I do not know Curtis Smith. I know Curtis Helms, in fact there are two of them; one is colored and

the other is white. The colored one lives in Buford Township and the white one in Monroe Township. I know E. C. Helms; he is white, and I do not know any colored E. C. Helms.

I have been Deputy Sheriff for eight years. When court is in session, I take charge of the courtroom. The Sheriff is there most of the time and I am there most of the time also. During the period, I knew personally that Lex Houston served on the Grand Jury and I believe that he served this year. He is serving now. He began to serve in February, 1958. I cannot remember any others who served; there may have been one more, but I can't remember.

Cross Examination: Solicitor for State

Witness: During my eight years of pubic service there, I have observed the trial panel and have observed Negroes serving on the trial juries. About every term of Court we have, from one to two, maybe more. And that has been true within the past eight years. I have just been elected Sheriff of the County.

Redirect Examination: Counsel for Defendant

Witness: During my eight years I have observed Negroes on the jury panel, one or two on practically every jury panel. Prior to that time, I was a City Police Officer and I did not get too much chance to go into the courtroom. But during those eight years, I can only remember seeing two Negroes on the Grand Jury.

Counsel for Defendant: At this time we would like to introduce the list of jurors we got from the Clerk, from the Grand Juries from 1936.

Court: Mr. Price, have you fixed those? Mr. Price said he had adjusted those.

Counsel for Defendant: We would like to have that Movant's Exhibit #1 and if it please the Court, we would like to introduce that into evidence. And we would like to introduce this read from the United States Census containing the 1930 census in regard to Union County.

"Number of persons 21 years and over, native white male, 7,825. Native white female, 7,851. This is for the year 1940. Foreign-born white male, 15. Foreign-born female white, 7. Male Negro, 2,134. Female Negro, 2,300. Other races, male 1, female, none. Then for the year 1930 Census. Native white male 21 years and over, 7,199. Native female white 21 years and over, 7,072. Foreign-born white male 21 years and over, 19. Foreign-born female white, 21 years and over, 14. Male Negro, 21 years and over, 2,030. Female Negro 21 years and over, 2,173. From the 1950 census covered by the United States as regard to the State of North Carolina, specifically."

Solicitor for State: Do you have a later census?

Counsel for Defendant: 1950 is the latest census.

Solicitor for State: All right.

Counsel for Defendant: Reading from the 1950 census, specifically page 3-104, "population of Union County, white male, 21 years and over, 9,086; white female, 21 years and over, 9,286. Known white males, 21 years and over, 2,288. Known white females, 2,378." Your Honor, we would like one other thing. One other thing the movant has to present and that is the completion of the tax papers for the years 1945 through 1958 by the Tax Collector.

Court: You can come back, Mr. Nivens.

B. F. NIVENS, RECALLED by defendant:

Redirect Examination: Counsel for Defendant

Witness: I have not been able to get the taxpayers for the years '54 through '58; I have been back there doing and was looking up these names of these people that you want identified. This Ike Montgomery, Vann Helms and Hoyle Helms, W. I. Helms and Curtis Helms and E. C. Helms. I did not find a colored Vann Helms, I found two or more that were white. I have a Vann Helms in Monroe Township, he is white. There were two Hoyle Helmses in Monroe Township in 1948. W. I. Helms was in Buford Township and he is white. The Curtis Smith that I knew was white. Curtis Helms is colored. There is a Curtis Helms that was 54 years old in 1939 in Buford Township. And there was a Curtis F. Smith listed in whites in Monroe. A Curtis F. and just a Curtis Smith, one was—both were white. In the year 1939, I found two white Curtis Helmses listed and one colored. I found two E. C. Helmses that are both white. I found three J. W. Helmses, they were all white. In the year 1937 the E. C. Helms was white. For the year 1938 I did not find J. W. Helms on the book as colored. W. R. Helms was white. W. I. Helms for the year 1945 was white. For the year 1948 I did not find a colored Hoyle Helms. I was unable to find for 1949 a colored Vann Helms.

Counsel for Defendant: With respect to this witness, the only other thing we have to present to the Court is this completion of these tax list for the year '54 to '58.

Court: How long will it take you to get that, Mr. Nivens?

Witness: Well, it is about ten books, nine scrolls for each year. I have got to count every name, which will take me from now until tomorrow.

Court: You were notified that was what you wanted.

Witness: To bring the records, not to have it broken down as to the number. Just the tax records.

Counsel for Defendant: We have a subpoena duces tecum for the records of the books over the past 25 years, specifically records of said 25 years as to show the number of Negro and white taxpayers in Union County each year during said period.

Witness Continues: I could estimate the percentages from previous years. There is a little increase in the past years in the number of taxpayers. I would say that in my opinion the percentages would be colored between 10 and 15 per cent. If I was going to say, I'd say 12½%. The number of taxpayers according to race would be substantially the same for the year 1954. The percentage basis, I would say, would be in the neighborhood of the same. I do know we have a larger number of receipts for the last two years, just maybe a hundred or two more than the previous years.

Counsel for Defendant: If we can get a stipulation from the Solicitor from that, that will be sufficient for us.

Court: As to what he said.

Solicitor for State: I will stipulate that the ratio of white and colored, as he has said, 12½% of the population is colored.

Counsel for Defendant: What I was saying, we have from the years 1936 to 1954. Mr. Nivens is saying that from those years on in each township, the ratio between white and colored taxpayers proportionally is the same. Now, in order to keep from going through these books can we get that it is approximately the same from '54 through '58.

Solicitor for State: That is all right.

Counsel for Defendant: With that the Movant rests.

Recross Examination: Solicitor for State

Witness: I have testified that over the period of years that I have referred to, it is my opinion that the percentages of Negroes in Union County is about 12½%.

Solicitor for State: I'd like to offer these two affidavits, if your Honor please, State's Exhibits 1 and 2. The Exhibit 1 is the affidavit of Mr. Roy J. Moore, and Exhibit 2 is the affidavit of Mr. James R. Braswell, Chairman of the Board of County Commissioners.

Counsel for Defendant: We would like, first of all, we have not seen the affidavit. We just wonder if they are admissible in this instance when these witnesses have gone on the stand and testified. Now, if there is any new matter which these affidavits purport to introduce, we wish to cross-examine those witnesses.

Solicitor for State: I don't object to your cross-examination.

Court: If you want to call them back up here, you can. Have you got copies of those?

Solicitor for State: Yes, sir.

Court: Let me see them while they are looking them over.

Counsel for Defendant: If your Honor please, we take the position that first of all, we don't think these affidavits are admissible and we think certain portions of these affidavits are not admissible. They are self-serving and they seek to draw conclusion of law, of the affiant in both of these statements. They have made reference to the fact there was no discrimination in what was done. For that reason it is a question of law for this Court to decide.

Counsel for Defendant: Objection.

Court: Objection overruled.

EXCEPTION #1.

Court: Let them be admitted. They are back here if you wish to ask them any further questions, you can do it.

JAMES R. BRASWELL (RECALLED by defendant):

Redirect Examination: Counsel for Defendant

Witness: My name is James R. Braswell and I believe that this is my signature on this affidavit. This affidavit was made two or three months ago, but I don't remember the date. I do not honestly know whether it was in Monroe or whether I signed that affidavit in the office. No, I did not type it up, and I do not know who typed it. I talked with our County Attorney about this and that is the situation, far as drawing it up, I am not a lawyer. The County Attorney is Smith & Griffin. In my affidavit I said that "the names of persons of the white race and the Negro race selected from the tax returns are therefore in direct proportion to the names of persons of the white race and the Negro race, appearing on the tax returns and the precinct registration books," and in my opinion that is true. I am not sure how many names there are on the precinct registration books. The only thing I could tell was the names that went in the books, roughly estimating this, of course, nine to ten thousand names, and I figure that juries, the selection of, is in direct proportion, on an estimated basis.

I would estimate that there are ten or twelve thousand names on the precinct book. This statement that was made was based on guessing, it is my best estimate. There are 23 or 24 precincts in Union County. I am not sure of the exact number. I do not know how many Negro names there are on the precinct book. I have heard, but I do not know exactly, but I have heard in the neighborhood of a thousand. When I made this statement as to direct proportion it was not of my own personal knowledge, because I certainly don't know all of the names that are on the list. They are in direct proportion to the best of my knowledge. I feel like the affidavit is correct to the best of my knowledge. I read it before I signed it, but I did not dictate it

to anyone. When I received it for my signature, it had already been drafted, although we discussed it.

Counsel for Defendant: With respect for the record, we would like to renew our objection to strike this from the record.

Court: Motion denied.

EXCEPTION #2.

ROY J. MOORE (RECALLED by defendant)

Redirect Examination; Counsel for Defendant

I am Clerk to the Board of County Commissioners and that is my signature to that affidavit but I do not recall when it was executed, not to the day. I do not know if it is dated or not. I'd say three or four months. The 7th of August would be about right. I did not dictate the affidavit. When it was brought to me for my signature it was already typed up. I read it before I signed it.

In this affidavit I stated that "affiant further says that since the question of discrimination between the races has been raised, affiant has examined the names of persons selected for jury service over a period of several years past and finds that the names of persons of the Negro race have been selected by the Board of County Commissioners and that persons of the Negro race have been selected on several occasions to serve as petit jurors and on the Grand Jury for Union County." I don't recall when I examined the books, there was a lapse of time from the time I had a conversation with the County Attorney, but I do not know when this conversation was held.

This conversation was prior to the execution of this affidavit. The books I examined were the tax scrolls and ledgers. I was going by past information, it came from abstracts of jury service. I did not go to the Clerk's office

to examine the Minute Docket, nor the jury books. I did not by actual count start from 1936 and come up to the present in the tax books to determine how many Negroes were on the tax books and how many whites, I checked a few years, but not all. I did not consult the Clerk's office at all.

I cannot give you the names of all the Negroes who served on the Petit Jury from 1936 to 1958. When I said in my affidavit that I had examined the names of persons selected for jury service for a period of years, I had reference to just the immediate years, the last seven years, about 1951 through 1958. The records I examined were the Minute Docket, not the ones in the Commissioners' office. That Minute Docket contains the names of persons who have been called for jury duty. The years 1951 to 1958 were the only ones I checked. I do not have any explanation for not checking the books for the years prior to 1951. I did not compose this affidavit, I had a conversation with Mr. Smith and he drew it up.

Recross Examination: Solicitor for State

Witness: He drew the affidavit after we had discussed the contents of the affidavit and it was drawn and submitted to me and I read it over and after reading it over I signed it.

Redirect Examination: Counsel for Defendant

Witness: I do not know that the County Attorney knew that I was to be a witness in this matter, at the time I do not know if I had been subpoenaed or not and I do not know that the reason the County Attorney discussed this matter with me was due to the fact that I had been issued a subpoena.

Counsel for Defendant: We would like for the record to show we renew our motion to strike the affidavit of Mr. Roy J. Moore as County Tax Accountant.

Court: Motion denied.

EXCEPTION #3

Counsel for Defendant: That is all we have to present. I would like to make this observation for the purpose of our argument. We have taken down all these names. We have not had a chance—the names, the tax collector gave us a total, and we will have to subtract the white from the total to get the Negro and we have not had a chance to do that and we will need that for our Argument to the Court.

Court: I will hear your argument now. I am not going to delay it any more; I will hear the argument.

Note: Argument by counsel to the Court.

Court: I'll deny the Motion.

EXCEPTION #31

* * * * *

The Court heard the evidence offered by the movant and the State upon the defendant's said Motion, and thereupon found facts as follows:

1. That the said Grand Jury at the October 1957 Term of Union County Superior Court was regularly drawn and constituted as provided by the North Carolina Statute and there was no systematic, purposeful, intentional or arbitrary exclusion of any qualified person from said jury by reason of race, or otherwise.

2. That adult Negroes constitute approximately 12% of the total adult population of Union County, North Carolina

3. That, although there was no member of the colored race on the Grand Jury of Union County in 1957 (the Grand Jury of said County was chosen for a period of one year as provided by law), members of the colored race

served on the Grand Jury at various times before and subsequent to 1957; and members of the colored race have served on the trial panel of said court regularly before, including and subsequent to 1957.

4. That no evidence was offered by movant that any qualified person to serve as a juror was wrongfully excluded from serving on the Grand and Petit juries of Union County at any time.

5. That the Bill of Indictment in this case was regularly and legally found and returned by a duly and legally constituted Grand Jury of Union County, North Carolina, at the October 1957 Term of Superior Court of said County.

6. That none of the movant's constitutional rights were violated or abridged in the selection of the Grand Jury which found and returned the Bill of Indictment in this case.

It is therefore considered, ordered and adjudged that the motion of defendant to Quash * * *

APPENDIX D

ARTICLE 4

Grand Jurors

NORTH CAROLINA GENERAL STATUTE 9-24. *How grand jury drawn.*

The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

NORTH CAROLINA GENERAL STATUTE 9-25. *Grand juries in certain counties.*

* * * If it should appear to the board of commissioners of Union County, thirty days before the beginning of the term of superior court that begins on the third Monday after the first Monday in March, that the condition of the criminal docket, and the number of prisoners in jail, make it necessary that said March term should be used as a criminal term, the said board of commissioners are authorized and empowered within their discretion to draw a grand jury for said term, and to give thirty days' notice in some local paper that criminal cases would be tried at said term, and all criminal process and undertakings returnable to a subsequent term shall be returnable to said March term. A grand jury for Union County shall be selected at each January term of the superior court in the usual manner by the presiding judge, which said grand

jury shall serve for a period of one year from the time of their selection * * *

North Carolina General Statute 9-26. *Exceptions for disqualifications.*

All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived. But no indictment shall be quashed, nor shall judgment thereon be arrested, by reason of the fact that any member of the grand jury finding such bills of indictment had not paid his taxes for the preceding year, or was a party to any suit pending and at issue.

FILE COPY

Office Supreme Court, U.S.
FILED
AUG 22 1959
JAMES R. BROWNING, Clerk

Supreme Court of The United States

October Term, 1958

No. 249

ALBERT E. PERRY,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of The United States

October Term, 1958

No. 249

ALBERT E. PERRY,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The Opinion of the Supreme Court of North Carolina is reported as 250 N. C. 119, 108 S. E. 2d 447, and the same Opinion is copied in the Appendixes to the Petition for Certiorari in this case, beginning on p. 24. The Judgment of the Supreme Court of North Carolina appears as Appendix A on p. 23 of the Appendixes attached to the Petition in this case. The Judgment of the Superior Court of Stanly County, the Trial Court, appears in Appendix C on p. 65 of the Appendixes attached to the Petition in this case.

The Supreme Court of North Carolina passed on this case prior to the Opinion cited above and reversed the case in favor of the Petitioner upon the basic ground that the Peti-

tioner had not been given a reasonable time and opportunity to investigate the matter of racial discrimination in the organization of the grand jury (see: STATE v. A. E. PERRY, 248 N. C. 334, 103 S. E. 2d 404—see also: State Record No. 433 at p. 3).

JURISDICTION

The Petitioner invokes the jurisdiction of this Court pursuant to 28 USC 1257(3), 2101(d), and pursuant to Rule 22(1) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The Respondent, State of North Carolina, submits that there is but one fundamental and basic question involved in this case, or Petition, and that it should be stated as follows:

Has the Petitioner shown, under the facts in this case, that persons of the colored race were arbitrarily, intentionally and systematically excluded from jury service in the selection of the Grand Jury of Union County, which returned the Bill of Indictment against the Petitioner?

This is stated by the Petitioner in different language in his Question No. 4 on p. 15 of his Petition. The other questions submitted by the Petitioner simply represent evidentiary phases of unconstitutional discrimination in the selection of juries.

STATUTES INVOLVED

The Petitioner submits as to State statutes the following: Secs. 9-24, 9-25 and 9-26 of the General Statutes of North Carolina, and these are copied in Appendix D, p. 102 of the Appendixes attached to the Petition. The Respondent, State of North Carolina, is satisfied with this designation of the statutes involved and agrees that the Fourteenth Amendment to the Constitution of the United States is invoked by the Petitioner.

STATEMENT

The Petitioner was originally indicted by the Grand Jury of Union County, North Carolina, on a charge of Abortion (State Record, p. 3—Appendix C, p. 42 of Appendixes attached to Petition). The Petitioner was first tried in the Superior Court of Union County, the trial beginning approximately on October 30, 1957, and the trial panel of 12 persons consisted of 10 white jurors and two Negro jurors. The Counsel for the Petitioner in this trial filed a Motion to Quash and Dismiss the Bill of Indictment upon the ground that members of the Negro race had been systematically excluded from Grand Jury service in Union County. These Motions were overruled, and the Petitioner was tried and convicted, and upon appeal to the Supreme Court of North Carolina that Court reversed the case for the reason that the Petitioner and his Counsel were denied by the Trial Court a reasonable opportunity and time to investigate the matter of racial discrimination (see: STATE v. A. E. PERRY, 248 N. C. 334, 103 S. E. 2d 404). Thereafter, upon motion of Counsel for the Petitioner (State Record, p. 4—Appendix C, p. 45 of Appendixes attached to Petition), the case was transferred to Stanly County for trial (see: State Record, pp. 9, 10—Appendix C, p. 52 of Appendixes attached to Petition).

When the case was called for trial in the Superior Court of Stanly County the Petiitoner in apt time interposed a Motion to Quash and Dismiss the Bill of Indictment upon the ground that the Grand Jury of Union County, which returned the Bill of Indictment, had been unconstitutionally organized because of systematic exclusion of colored persons from Grand Jury service (State Record, pp. 25, 26—Appendix C, pp. 53, 54, of Appendixes attached to Petition). The Trial Judge heard the evidence of Petitioner on the issue of discrimination in the organization of the Grand Jury, made findings of fact and overruled the Motion to Quash the Bill of Indictment (State Record, pp. 17, 18—Appendix C, pp. 61, 62, of Appendixes attached to Petition). The Petitioner reserved exceptions, was tried and convicted and again appealed to the Supreme Court of North Carolina, which Court affirm-

ed the Judgment of the Trial Court (STATE v. A. E. PERRY, 250 N. C. 119, 108 S. E. 2d 447). The Petitioner is a Negro physician, and the woman upon whom it was charged that the abortion was performed is a white woman. The Court will note from the State Record that the Petitioner did not object to the trial panel of jurors which convicted him, nor did he object to the method of their selection and organization.

ARGUMENT

The Respondent omits any statement of facts or review of the evidence as to the actual trial of the Petitioner on the charge of abortion for which he was convicted. This is so because the Petitioner has not raised any question of a constitutional nature as related to his actual trial but simply contends that the Bill of Indictment is invalid because of unconstitutional discrimination in the organization of the Grand Jury which returned the Bill of Indictment in Union County.

THE PETITIONER HAS NOT SHOWN UNDER THE FACTS IN THIS CASE THAT PERSONS OF THE COLORED RACE WERE ARBITRARILY, INTENTIONALLY AND SYSTEMATICALLY EXCLUDED FROM JURY SERVICE IN THE SELECTION OF THE GRAND JURY OF UNION COUNTY, WHICH RETURNED THE BILL OF INDICTMENT AGAINST THE PETITIONER.

Before dealing with the factual matters relating to this case we assert that several propositions have been established in the field of alleged discrimination as related to jury selection as measured by the Fourteenth Amendment:

(1) Petitioner is not entitled, as a matter of constitutional right to be indicted or tried by a jury which contains proportional representatives of the white and colored races, nor is he entitled to be indicted or tried by a jury composed in part of members of his own race or class (MARTIN v. TEXAS, 200 U. S. 316, 50 L. ed. 497).

(2) Colored persons eligible for jury duty are entitled to have their names in the jury box and where, as in this case, the names are drawn by chance, they are entitled to have their chance to serve on the Grand Juries and Trial Juries of the County on the same basis as white jurors. Petitioner is not to be deprived by design of the chance of having colored persons on the Grand Jury or Trial Jury (MARTIN v. TEXAS, supra; STRAUDER v. WEST VIRGINIA, 100 U. S. 303, 25 L. ed. 664; NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074; HOLLINS v. OKLAHOMA, 295 U. S. 394, 79 L. ed. 1500; HALE v. KENTUCKY, 303 U. S. 613, 82 L. ed. 1050; PIERRE v. LOUISIANA, 306 U. S. 354, 83 L. ed. 757; SMITH v. TEXAS, 311 U. S. 128, 85 L. ed. 84).

(3) The conduct that is condemned in the administration of a jury system is "purposeful discrimination," or, as expressed in other words, "long continued, unvarying and wholesale exclusion of Negroes from jury service" (AIKENS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074).

(4) It is not enough to simply show that there were no Negroes on the Grand Jury but the burden is on the Petitioner to show an alleged discrimination in the selection of Grand Jurors or Trial Jurors (AIKENS v. TEXAS, supra; MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87; FAY v. NEW YORK, 332 U. S. 261, 91 L. ed. 2043).

(5) Former errors in the selection of a grand jury or trial jury cannot invalidate future trials; the problem is whether or not Petitioner was indicted by a grand jury because names of jurors were selected by discriminating against Negroes solely on account of race and/or color. It is the particular administration and organization of the Grand Jury which returned a bill of indictment against Petitioner which is decisive (BROWN v. ALLEN, 344 U. S. 443, 97 L. ed. 469; CASSELL v. TEXAS, 339 U. S. 282, 290, 295, 94 L. ed. 839, 848, 851).

(6) A nondiscriminatory use of the tax list, which fairly

includes the white and colored races, does not violate the Fourteenth Amendment (BROWN v. ALLEN, supra).

(7) This Court has said in substance that a great deal of decisiveness must be given to the determination, on this question, made by the trial court and by the appellate court (THOMAS v. TEXAS, 212 U. S. 278, 53 L. ed. 512).

(8) There is a presumption that officers in charge of the selection of members of a grand jury or a trial jury have performed their duties fairly and justly without discrimination against any race or class (TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572).

(9) Where the population ratio of Negroes is small as compared to the white race it is unsafe to attach too much significance to any law of recurrences in determining arbitrary discrimination (SWAIN v. STATE, 250 Ind. 259, 18 N. E. 2d 921, 926).

(10) Fairness in selection does not require proportional representation of races upon a jury (AIKENS v. TEXAS, supra; THOMAS v. TEXAS, supra; VIRGINIA v. RIVES, 100 U. S. 313, 25 L. ed. 667).

(11) On questions of jury discrimination the Supreme Court of North Carolina follows the decisions of this Court (STATE v. PEOPLES, 131 N. C. 784, 42 S. E. 814; STATE v. SPELLER, 229 N. C. 67, 47 S. E. 2d 537; MILLER v. STATE, 237 N. C. 29, 74 S. E. 2d 513, cert. den. 345 U. S. 930, 97 L. ed. 1360).

THE EVIDENCE AS TO JURY DISCRIMINATION IN THIS CASE.

Petitioner in his argument in this Petition attempts to increase the ratio of colored population as related to the white population in Union County by the use of United States Census Reports. We would call to the Court's attention that in the trial of this case Counsel for the Petitioner and the

Prosecuting Attorney for the State of North Carolina stipulated that the percentage of Negroes in Union County, as related to the white population, was 12-1/2% (see State Record, pp. 56, 57-Appendix C-p. 95 of Appendixes attached to this Petition). Furthermore, the Trial Judge found as a fact: "that adult Negroes constitute approximately 12-1/2% of the total adult population of Union County, North Carolina." (State Record, p. 62-Appendix C-p. 100 of Appendixes attached to Petition). If this Court will examine the exceptions of Petitioner to Findings of Fact in Order Overruling Motion to Quash, this Court will see that Counsel for the Petitioner did not file any objection or exception to the above-quoted finding of fact (State Record p. 63). This fact was noted by the Supreme Court of North Carolina in its Opinion (STATE v. A. E. PERRY, 250 N. C. 119, 108 S. E. 2d 447) and in this connection the Supreme Court of North Carolina said: "Defendant neither excepts to, nor assigns as error, the Finding of Fact No. 2 'that adult Negroes constitute approximately 12-1/2% of the total adult population of Union County, North Carolina.'" As to population ratios, therefore, the case should be passed upon the basis of 12-1/2% as colored because this ratio was used before the Supreme Court of North Carolina without objection or exception.

A few excerpts from the evidence in this case will show that there has been no long-continued, unvarying and wholesale exclusion of Negroes from jury service in Union County, and, therefore, the extreme cases cited by Petitioner have no application to this case.

J. Hampton Price, Clerk of the Superior Court of Union County for nine years, and prior to that County Tax Collector of Union County for about 13 years, among other things testified as follows: "I have the jury book with me covering the period from 1945 up to the present. I think the Minutes of the Court take care of the jury up until that time. I have the Minute Docket Book of the Court back to 1936 **** Ike Montgomery, a Negro, was on the Grand Jury in 1954. Lex Houston, a Negro, was on the Grand Jury in 1958. There were

other Negroes in the panels, but when you are drawing them by lot it is not always possible to get a Negro on the Grand Jury, due to the small ratio between Negroes and whites in Union County."

B. F. Niven, County Tax Collector of Union County for eight years, and prior to that Deputy Sheriff of the County for four years, and Sheriff of the County for 16 years, testified, among other things, as follows: (The Witness testified from records and ledgers covering 21 or 22 years as to the number of whites and the number of Negroes in the nine townships of Union County for a number of different years—see State Record pp. 37, 38, 39, 40, 41) "I cannot say that any Negroes were on the Grand Jury during my term. They were on the regular panel but the Grand Jury is selected out of the regular panel in the Courtroom in the presence of the Court by a child out of a hat. The whole panel is in there."

Roy J. Moore, Tax Accountant and Tax Supervisor of Union County since May 15, 1935, testified, among other things, as follows: "He is Clerk to the Board of County Commissioners of Union County. He helps prepare the jury lists. The jury lists are prepared every two years from the tax scroll for men, both Negroes and whites. He gets the names of women, both Negroes and whites, from the precinct lists. About 10% of the names placed in the jury books are women. When the jury list is prepared, it is presented to the Board of County Commissioners. The names so presented are cut from this list and put in the jury box. **** No Negroes have been excluded from the grand juries because of race to his knowledge." (An affidavit of this witness introduced in evidence shows that only one Negro was on the jury panel for 1957, but when the Grand Jury was drawn this Negro did not fall upon the Grand Jury but served on the trial panel. See State Record p. 50).

Shelley Griffin, Deputy Sheriff for eight years, a policeman for six years and just elected Sheriff of Union County, testified in part: "When Court is in session, I take charge of the Courtroom. The Sheriff is there most of the time and I am

there most of the time. **** During my eight years of public service there, I have observed the trial panel and have observed Negroes serving on the trial juries. And that has been true within the past eight years. **** During my eight years I have observed Negroes on the jury panel, one or two practically every jury panel" (see State Record pp. 53, 54).

The Petitioner has offered no evidence whatsoever that there was any racial discrimination in taking the names from the tax lists and precinct lists, placing them on scrolls, putting them in the jury box, and in drawing the jury from the box. When the panel is constituted the names are cut into scrolls, placed in a hat and drawn from the hat by a child under 10-years of age. There is no doubt but what Negroes have served as jurors on many trial panels, and they served on the trial panels because they happened to be drawn for those panels by chance and were not drawn to serve on the Grand Jury, which was also by chance. Both panels are drawn from the same hat. Since the Negroes constitute only 12-1/2% of the population of the County, it is a fair inference that the percentage ratio from the tax lists would be less than 12-1/2%, and it is not astonishing when we consider this low population ratio that very few have served on a grand jury and several have appeared and served on the trial panels. Population figures with the Federal Government will show that as you go from the Seacoast of North Carolina to the mountains of the State the Negro population gradually diminishes until you arrive at a mountain county by the name of "Graham County" in which no Negroes live or reside at all.

Petitioner relies strongly on the case of EUBANKS v. STATE OF LOUISIANA, 356 U. S. 584, 2 L. ed. 2d 991, but this case is easily distinguished from our case because of the methods involved in selecting the jury. In the Eubanks case Negroes constituted about 1/3rd of the population of the parish. The method of selecting the jury is described in the Opinion of this Court as follows:

> "A jury commission is required to select, impartially, from the citizens of the Parish of Orleans having the

qualifications requisite to register as voters, the names of not less than seven hundred and fifty persons competent . . . to serve as jurors.' Twice each year the Commissioners draw the names of 75 persons from this group. The list of 75 is then submitted to one of the six judges of the local criminal court, who, in rotation, choose a new grand jury of 12 every six months. Obviously the judges have broad discretion in selecting from the list provided by the Commission. State v. Dorsey, 207 La. 928, 22 So. 2d 273. Several of them interview a substantial number of prospective jurors before making their choice. Others, including the judge who chose the jury that indicted petitioner, testified that they usually selected on the basis of personal knowledge or reputation in the community."

There was evidence in the Eubanks case that a substantial number of the Negro population in the parish were educated, registered to vote and possessed the qualifications required for jury service and that Negroes had served on the Federal Grand Juries in the parish for many years. There is no such evidence in this case. It is manifest that in the Eubanks case a great deal is left to the subjective judgment of the Jury Commission and to the judges who choose the Grand Jury from the list, whereas, in this State the jurors are drawn entirely by chance or by lot.

In PATTON v. MISSISSIPPI, 332 U. S. 463, 92 L. ed. 76, this Court said that there was an "uncontradicted showing that for 30 years or more no Negro had served as a juror in the criminal courts of Lauderdale County."

In NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074, no Negro had been called for jury service for a generation or longer, and it was further shown that there were Negroes in the County who were members of school boards, or trustees of colored schools, and were property owners and householders and eligible for jury duty

In PIERRE v. LOUISIANA, 306 U. S. 354, 83 L. ed. 757, one-half of the population from which the venire was drawn were Negroes, and a majority of the Negroes could read and

write but no Negro for a period of ten years had served on either the Grand Jury or the Trial Jury. The other cases cited on this point can also be distinguished from this case for the same reasons.

CONCLUSION

The Respondent, State of North Carolina, therefore, contends that there is no evidence of any systematic, purposeful, arbitrary exclusion of Negroes from the Grand Jury in Union County; that, therefore, the Petition for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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